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Feb. 4 1875

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~448~~. 165

THE AMERICAN LIFE-INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

ZENORA F. AND WILLIAM C. D. MAHONE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

FILED JULY 9, 1873.

Oct 1 1874

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1 UNITED STATES OF AMERICA,
Southern District of Mississippi:

Circuit court of the United States, fifth judicial circuit.

MONDAY, *November 4th, A. D.* 1872.

At a regular term of the said circuit court of the United States for the southern district of Mississippi, held at Jackson, in said district, on the first Monday, being the 4th day of November, in the year of our Lord one thousand eight hundred and seventy-two, and of our Independence the ninety-seventh, there were present the honorable Robert A. Hill, district judge for Mississippi, E. P. Jacobson, district attorney, M. Shaughnessey, marshal, and George T. Swann, clerk.

ZENORA F. MAHONE AND WILLIAM C. D. MAHONE
vs.
THE AMERICAN LIFE INSURANCE COMPANY. } No. 49.

Be it remembered that heretofore, to wit, on the 30th day of October, A. D. 1872, the defendants, The American Life Insurance Com-
2 pany, by their attorneys, filed in the office of the clerk of said circuit court of the United States for the southern district of Mississippi, at Jackson, in said district, a transcript of the record of a suit instituted in the circuit court for the second district of Hinds County, in said State of Mississippi, wherein said Zenora F. Mahone and William C. D. Mahone were plaintiffs, and said American Life Insurance Company were and are defendants; which said transcript of record, together with all the papers filed, and process, proceedings, orders, and the final judgment of said circuit court of the United States thereon, are in the words and figures following, to wit:

TRANSCRIPT OF RECORD

Pleas and proceedings had and done before the honorable George F. Brown, judge of the fifteenth judicial district of the State of Mississippi, at a circuit court begun and held in and for the second district of Hinds County, at the court-house thereof, in the town of Raymond, on the eleventh Monday after the fourth Monday of March, A. D. 1872, the same being the tenth day of June, A. D. 1872.

3 Z. F. AND W. C. D. MAHONE, PL'FFS,
vs.
THE AMERICAN LIFE INSURANCE COMPANY, def'd'ts.

Be it remembered that heretofore, to wit, on the 30th day of May, A. D. 1871, plaintiffs, by attorneys, filed in the court aforesaid their declaration against defendants in these words, to wit:

STATE OF MISSISSIPPI, *Hinds County:*

In the circuit court, 2nd district, of said county.

Zenora F. Mahone, and William C. D. Mahone, her husband, complain of the American Life Insurance Company, a corporation organ-

ized under the laws of the State of Pennsylvania, and located and domiciled in the city of Philadelphia, in said State of Pennsylvania, of a plea of trespass on the case on promises:

For that whereas, heretofore, to wit, on the 30th day of August, A. D. 1870, Leonidas Dillard, who, plaintiffs aver, was the brother of the said Zenora F. Mahone, applied to John G. Yeizer, who was then and now is the duly appointed agent of said defendants in said county of Hinds, to insure the life of him, the said Leonidas Dillard, for the sum of five thousand dollars, for the benefit of his said sister, Zenora
4 F. Mahone, and after due examination by the medical examiner of said company, of the said Dillard, and on payment by the said Leonidas Dillard of the premium of forty-three dollars and seventy-seven cents, to said defendants, and the agreement of said Dillard to pay to said defendants the further sum of forty-three $\frac{77}{100}$ semi-annually thereafter, to wit, on the 30th day of August and the last day of February in each and every year, always in advance, said company, in consideration of the said payment of the said premium of forty-three $\frac{77}{100}$ dollars, *have* said defendants on said 30th day of August, 1870, by said Leonidas Dillard, and the agreement of said Dillard to pay to said defendants the further premium of forty-three $\frac{77}{100}$, to be paid by said Dillard to said defendants on the last day of February, 1871, and semi-annually thereafter, made a policy of insurance upon the life of the said Leonidas Dillard, for the benefit of his sister, the plaintiff, Zenora F. Mahone, and thereby promised to assure the life of the said Leonidas Dillard in the sum of five thousand dollars during and for the term of his natural life, for the use and benefit of said Zenora F., and by said policy said defendants did promise and agree
5 well and truly to pay, or cause to be paid, to the said plaintiff, Zenora F. Mahone, sister of said Leonidas Dillard, her executors, administrators, or assigns, within sixty days after due notice and satisfactory proofs of the death of the said Leonidas Dillard, or when he shall have attained the age of eighty years, the said sum of five thousand dollars, which policy is in the words and figures, to wit:

Number 25,999.] [5,000 dollars.

AMERICAN LIFE INSURANCE COMPANY, PHILADELPHIA.

This policy of insurance witnesseth, that the American Life Insurance Company, in consideration of the payment of forty-three $\frac{77}{100}$ dollars, and of the further premium of forty-three $\frac{77}{100}$ dollars, to be paid semi-annually thereafter, to wit, on the thirtieth day of August and last day of February in each and every year, always in advance, do assure the life of Leonidas Dillard, of the county of Hinds and State of Mississippi, in the sum of five thousand dollars, for the term of his natural life.

6 And the said company do hereby promise and agree well and truly to pay, or cause to be paid, the sum insured to Zenora F. Mahone, sister of said Leonidas Dillard, her executors, administrators, and assigns, within sixty days after due notice and satisfactory proof of the death of the said Leonidas Dillard, or when he shall have attained the age of eighty years, first deducting any indebtedness to the company, and any unpaid balance on the premium of the current year.

Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured upon these express conditions, that in case the said Leonidas Dillard shall,

without the consent of this company previously obtained, visit those parts of the United States which lie south of the 32 degree of north latitude, between the 1st June and the first of November, or shall, without such previous consent, enter into any military or naval service whatever, (the militia not in actual service excepted,) or shall, without such previous consent, be personally employed as an engineer or fireman in running a locomotive or steam-engine, or as a conductor, brakeman, or hand
7 on a railroad, or as an officer, hand, or servant of any steam-vessel, or as a miner or hand in any coal or other mine, or in the manufacture or transportation of gunpowder, or in case he shall become so far intemperate as to impair his health, or induce delerium tremens, or shall die by his own hands, whether sane or insane, or by the hand of justice, or in the known violation of any law of any of these States, or of the United States, or of any State or country, this policy shall be void and of no effect.

And it is hereby declared and agreed that if in the proposals, answers, and declarations made by the said Leonidas Dillard, and bearing date the 30th day of August, 1870, upon the full faith of which this policy is issued, shall be found to be fraudulent or untrue in any respect, or that there is any wilful misrepresentation or concealment in said declarations, or in case said premiums are not paid as hereinbefore mentioned on or before 12 o'clock at noon, on the several days specified and appointed for the payment of the same, then this policy shall be void and of no effect, and all payments made shall be forfeited to the company.

8 And it is hereby declared and agreed that, if at any time after three full annual payments have been paid *been paid* upon this policy, it shall be surrendered while yet in force, the company will issue a paid-up non-forfeiture policy therefor for such an amount as the then present value of the policy would purchase in a single premium.

And it is also agreed that this policy and the insurance hereby effected shall be subject to the several conditions and regulations printed on the back hereof, so far as the same are applicable, in the same manner as if the same respectively were incorporated in this policy.

No assignment of this policy shall be of any force and effect, unless approved by the company and endorsed thereon by the secretary or other authorized officer within thirty days after the date thereof; otherwise the premiums shall be considered sunk for the benefit of the company.

This policy shall not be valid until the actual payment of the premium has been made in cash, and receipted for at the bottom of this policy by C. Handy, agent for Mississippi.

In witness whereof, the president of the said American Life
9 Insurance Company, on behalf of the board of trustees, has hereunto subscribed his name, attested by the secretary, and caused the common seal of the said company to be affixed at the office in Philadelphia, this 30th day of August, eighteen hundred and seventy.

[L. S.] Attest: JOHN S. WILSON, *Secretary.*

Received, Canton, forty-three $\frac{77}{100}$ dollars, it being the first above-named premium.

(Signed) JOHN G. YEISER, *Dist. Agent.*

On the face of said policy is endorsed in writing, "All restrictions as to travel and residence removed."

On the back of said policy the following conditions are printed:

I. Policies expire at noon on the last day of the period for which payment has been made.

II. If a change takes place in the name, or in the place of residence of the insured, notice of such change must be given to the company.

III. Agents are not authorized to make contracts for the company, nor to write upon the policy, (except his signature when necessary to the first receipt of premium—see condition 5th,) nor to waive forfeiture of same.

10 IV. In case of the assignment of a policy, (whether as security or otherwise,) satisfactory proof of the amount of the assignee's interest in the insured life must be furnished, with the proofs of death.

V. Receipts of premiums, excepting the first, (to be found on the face of this policy,) will invariable be given on a separate paper, and will not be valid without the seal of the company.

PROOFS OF LOSS REQUIRED.

1. A certificate of the physician who attended the insured in his last illness, stating particularly the nature of the disease, its duration, and the date and hour of decease; his apparent age, heighth, complexion, and general appearance.

2. Certificate of a friend, or intimate acquaintance, stating the disease of which party died, how long he was sick, a knowledge of *of* such death, and how obtained, and the time of death.

3. Certificate of sexton, or undertaker, who superintended the funeral of insured, and saw his remains interred, stating apparent age, height, complexion, and general appearance.

The said certificates must be sworn or affirmed to, before some
11 magistrate, or public officer empowered to administer an oath, accompanied by a certificate in conformity to the act of Congress, of the authority of the officer who administers the oath.

And said plaintiffs aver that, after the issuance of said policy by said company, and after the payments of the premiums as aforesaid, and whilst said policy was in full force, to wit, on the 4th day of November, 1870, that the said Leonidas Dillard departed this life at the circuit aforesaid, and that plaintiffs made satisfactory proof of the death of said Leonidas Dillard to said company, according to the terms and conditions of said policy, and gave them due notice of the decease of said Dillard, more than sixty days before the institution of this suit, to wit, on the of , 1870.

And the plaintiffs further aver that John G. Yeiser was and still is, the duly-authorized agent of said company in and for the 2nd district of Hinds County, and that he, as agent for the defendants, had full authority to receive and receipt for the premium paid as aforesaid by said Leonidas Dillard to defendants.

12 By reason of the premises a right of action hath accrued to plaintiffs to demand and have of said defendants the said sum of five thousand dollars, with interest and costs.

Yet the said defendants, though often requested, and though sixty days after such notice of the decease of said Dillard, and satisfactory proof thereof, have elapsed, have never paid said sum of five thousand dollars, with the interest thereon, to said plaintiff, Zenora F. Mahone, or to her said husband, or to either of them, or to any person for them, but to pay the same, or any part thereof, to said plaintiffs, or either of them, said defendants have hitherto wholly neglected and refused, and

still doth neglect and refuse, to the damage of said plaintiffs of $7,500, and therefore they bring their suit, &c.

HARRIS AND WITHERS AND
JOHN SHELTON, *P. Q.*

Filed, and writ issued 30th May, 1871.

N. HODGE, *Clerk.*

And on the filing of said declaration the following writ of sum-
13 mons issued, which, with the endorsements and sheriff's returns thereon, is in the words and figures following, to wit:

The State of Mississippi to the sheriff of Hinds County, greeting:

We command you hereby that you summon the American Life Insurance Company, if to be found in your county, so that they be before the circuit court to be holden in and for the 2nd district of the county of Hinds, at the court-room thereof, in the town of Raymond, on the 2nd Monday of June, 1871, to answer the complaint of Zenora F. Mahone and William C. D. Mahone, her husband, against the said defendants, now on file in the clerk's office of said court, and have you then and there this summons.

The amount demanded in this suit is the sum stated in the declaration, and lawful interest and costs. Judgment will be demanded at return-term. Complaint filed when summons issued.

Witness my hand and seal of said court this 30th day of May, 1871. Issued the 30th day of May, 1871.

[L. S.] N. HODGE, *Clerk.*

14 This is an action of assumpsit, founded on a policy of insurance for $5,000 on the life of Leonidas Dillard, for the benefit of the plaintiff, Zenora F. Mahone. The damages demanded in the declaration are $7,500.

N. HODGE, *Clerk.*

Executed on the American Life Insurance Company this 4th day of May, 1871, by personal service on John G. Yeiser, their agent for Hinds County, Miss., and delivered him a copy of the summons.

J. L. LAKE, JR., *Sh'ff,*
By C. W. BARBER, *S. D. S.*

We consent that the defendant may have until the 1st day of July, 1871, to file pleas in this case.

June 15th, 1871.

JOHN SHELTON,
For Pl'ffs.

June term, 1871, 6th day, 17th June, 1871.

Z. F. MAHONE ET AL.
vs. } 4260.
AMERICAN LIFE INSURANCE CO.

Continued with leave to defendants to plead by 1st of July, 1871.

15 *Def'ts' pleas.*

ZENORA F. MAHONE AND W. C. D. MAHONE
vs.
THE AMERICAN LIFE INSURANCE COMPANY. } No. 4260.

In the circuit court for the second district of Hinds County, Mississippi, to the June term, 1871.

1st. And now come the said defendants, by their attorneys, and defend the wrong, and injury, &c., and for a plea in this behalf, say, that said plaintiffs ought not to have and maintain their aforesaid action hereof against them, because, they say, that the said policy of insurance on the life of the said Leonidas Dillard, which is set out in their declaration hereof against these defendants, was void and of no effect at the time the same was issued and executed by these defendants, because the same was so executed and issued by these defendants under and by reason of certain false and fraudulent representations made to them by the said Leonidas Dillard in his proposals to them for the execution and issuance by them of said policy of insurance, which said proposals are referred to in said policy of insurance, as bearing date the 30th
16 day of August, 1870, as "upon the full faith of which this policy is issued," and a copy of which said proposals is herewith filed as a part of this plea, as fully, and to all intents and purposes, as if the same were herein copied, and which is marked Exhibit No. 1, in this to wit: that to question No. 5, in said proposals, which is in these words, to wit: "Is the party temperate and regular in his habits?" said Leonidas Dillard answered as follows, to wit: "Yes," intending by such answer to induce said defendants to believe, and which did induce them to believe, that he, the said Leonidas Dillard, was temperate and regular in his habits, and especially that he was temperate in his habits as regarded the use or drinking of intoxicating liquors.

And the said defendants aver that, in fact, at the time of making said answer, said Leonidas Dillard was in the habit of using and *and* drinking intoxicating liquors to such an extent as frequently to induce, cause, or produce drunkenness; and that his said answer to said question No. 5, hereinbefore copied, was false and fraudulent, and that the same was so made for the purpose of imposing upon and deceiving said defendants, and to induce them to execute and issue said policy of insurance on his life.

17 Wherefore, and by reason of said false and fraudulent answer and representation made by said Leonidas Dillard, said defendants say they were imposed upon and deceived into the execution and issuance of said policy of insurance on the life of said Leonidas Dillard, and that by reason thereof the said policy of insurance is void and of no effect. And this said defendants are ready to verify. Wherefore they pray judgment, &c.

SEMMES AND COOPER AND
T. J. AND F. A. R. WHARTON,
Attorneys for Defendants.

2nd. And for a further plea in this behalf, said defendants, by their attorneys, say, that said plaintiffs ought not to have and maintain their aforesaid action hereof against them, because, they say, that the said policy of insurance on the life of the said Leonidas Dillard, which is set forth in their said declaration hereof against these defendants, after

the same was executed and issued by these defendants, became and was "void, null, and of no effect," according to one of the condi-
18 tions therein expressed, because they say that the said Leonidas Dillard, after the said execution and issuance of said policy of insurance, became "so far intemperate as to impair his health." And this the said defendants are ready to verify. Wherefore they pray judgment, &c.

SEMMES AND COOPER AND
T. J. AND F. A. R. WHARTON,
Attorneys for Defendants.

3rd. And for a further plea in this behalf, said defendants, by their attorneys, say: That said plaintiffs ought not to have and maintain their aforesaid action against them, because, they say, that the said policy of insurance on the life of said Leonidas Dillard, which is set out in their declaration hereof against these defendants, was void and of no effect at the time the same was executed and issued by these defendants, because the same was so executed and issued by these defendants under and by reason of certain false and fraudulent representations made to them by the said Leonidas Dillard, in his proposals to them for the execution and issuance, by them, of said policy of insurance, which
19 said proposals are referred to in said policy of insurance, as bearing date the 30th day of August, 1870, as "upon the full faith of which this policy is issued," and a copy of which said proposals is herewith filed as part of this plea, as fully, and to all intents and purposes, as if the same were herein copied, and which is marked No. 1, in this, to wit: That, to question No. 15, in said proposals, which is in these words, to wit: "Has a proposal been made for insuring the life"—intending thereby to refer to the life of said Leonidas Dillard—"in this or any other office"—intending thereby to refer to any other life insurance company—"and, if so, whether accepted or declined? If insured, state in what company, and for what amount?" said Leonidas Dillard answered as follows, to wit: "Insured in Equitable, $5,000," thereby intending to induce said defendants to believe, and which did so induce them to believe, that the life of said Leonidas Dillard had been insured in the Equitable Life Insurance Company of New York, at and for the sum of five thousand dollars.

And said defendants aver that, at the time of making said an-
20 swer, the life of said Leonidas Dillard had not been insured by said Equitable Life Insurance Company of New York for any amount of money whatever, and that said answer of said Leonidas Dillard, herein last refer'ed to, was false and fraudulent, and was so made by him for the purpose of imposing upon and deceiving said defendants, and to induce them to execute and issue said policy of insurance on his life. Wherefore said defendants aver that, by reason of said false and fraudulent answer so made by said Leonidas Dillard as lastly herein refer'ed to, they were imposed upon and deceived into the execution and issuance of said policy of insurance on the life of said Leonidas Dillard, and that by reason of said false and fraudulent answer said policy of insurance on the life of said Leonidas Dillard is void and of no effect. All of which said defendants are ready to verify. Wherefore they pray judgment, &c.

SEMMES AND COOPER, AND
T. J. AND F. A. R. WHARTON,
Attorneys for Defendants.

21 4th. And for a further plea in this behalf said defendants, by their attorneys, say that said plaintiffs ought not to have and maintain their aforesaid action hereof against them, because, they say, that said plaintiffs did not at any time before the institution of their aforesaid suit hereof, make satisfactory proof to these defendants of the death of said Leonidas Dillard, according to the terms and conditions of said policy of insurance on the life of said Leonidas Dillard. And this said defendants pray may be inquired of by a jury, &c.

SEMMES AND COOPER, AND
T. J. AND F. A. R. WHARTON,
Atto's for Defendants.

Exhibit No. 1 *to* 1*st and* 3*rd pleas.*

AMERICAN LIFE INSURANCE COMPANY.

Proposals for insurance.

The agent is requested to be particular to have all the questions in this application carefully answered, dates filled up and signed by the applicant, and witnessed.*

1. What is the name and residence of the person for whose benefit this insurance is to be effected? If a married female, or widow, state names in full, and also her maiden name. State Christian names
22 in full.

Zenora Florida Mahone, Hinds Co., Miss. Married. Zenora Florida Dillard.

2. What is the name, residence, and occupation or trade of the person whose life is proposed to be insured? (See note as above.)

Leonidas Dillard. Farming.

3. Place and date of birth of the life proposed for insurance, State, county, and town? Age next birth-day?

Born at Summerville, Russell County, on the 29 day of March, 1839.

4. Are the party's parents living? If not, at what age, and of what disease did they die? State full name of the father.

Father, dead. 72 years. Old age. Mother, dead. 60 years. Fever.

5. Is the party temperate and regular in his habits?

Yes.

6. Has the party had the small-pox, or been vaccinated?

Has not had the small-pox; been vaccinated.

7. Has the party at any time been afflicted with insanity, gout, asthma, scrofula, convulsions, palsey, appoplexy, consumption, spitting of blood, or any disease of the lungs or throat whatever, or any other disease likely to impair his constitution or shorten life, or been afflicted with disease of the heart, or of the urinary organs? If so, which?

(On margin.)—Acclimated by reason of life-time residence.

23

No.

8. Has the party's father, mother, brother, or sister, been afflicted with consumption or any other disease of the lungs, or any other serious family disease, such as scrofula, insanity, &c., &c.?

No.

9. Has the party experienced any wound, hurt, or other serious bodily injury?

---

* The first two questions will have the same answer when the applicant insures his own life; different when he insures the life of another.

No.

10. Is the party now in good health, and does he usually enjoy good health?

Yes.

11. Name and residence of the said party's usual medical attendant, to be referred to for information as to the past and general state of health, and how long has he known the party? If no medical attendant, name and residence of an intimate friend, competent to give the required information.

Jno. T. Cox—friend—has known him 20 years.

12. Is there any circumstance which renders an insurance on his life more than usually hazardous, such as place of residence, occupation, hereditary predisposition, constitutional infirmity, or other known
24 cause or any other circumstance or information with which the company ought to be made acquainted?

No.

13. Sum to be insured, (write words in full;) premium how payable?—Five thousand ($5,000) dollars; semi-annually.

14. Term for which the insurance is required.—Life.

15. Has a proposal been made for insuring the life in this or any other office; and, if so, whether accepted or declined. If insured, state in what company, and for what amount.—Insured in Equitable; $5,000.

16. Is the applicant aware that any untrue or fraudulent answers to the above queries, or any suppression of facts in regard to health, habits, or circumstances, or neglect to pay the premium on or before the day it becomes due, will vitiate the policy and forfeit all payments made thereon?—Yes.

17. What plan of insurance is desired?—Ord. Life, Table No. 6.

Dated at Edwards' Depot this 30 day of August, 1870.

Signature: (Signed) LEONIDAS DILLARD.

Witness:

(Signed) JNO. G. YEISER,
Dist. Ag't.

25 *Declaration.*

[The agent is requested to have this declaration carefully filled up and signed by the applicant, and witnessed.]

I do hereby declare that my age does not exceed 31 years; that I am now in good health, and do ordinarily enjoy good health; and in the foregoing proposal I have not withheld any material circumstances or information touching the past or present state of the health or habits of life with which the American Life Insurance Company ought to be made acquainted.

And I do hereby agree that this declaration and the foregoing proposals shall be the basis and conditions of the contract between myself and the said company; and if at any time hereafter the company shall discover that any fraudulent or untrue allegation be contained herein, or in the proposals, or any material misstatement of facts regarding the condition or health of the party insured, then, in any and every such case, the said company may refuse to receive further premiums on such insurance; and all moneys paid on account of the same shall be forfeited to the said company, and the policy of insurance made on the faith of this declaration and the proposals shall become null, void, and of none effect.

26 Dated at Edwards' Depot, Miss., this 30th day of August, A D. 1870.

Signature: (Signed) LEONIDAS DILLARD.

Witness:
(Signed) JNO. G. YEISER,
Dist. Ag't.

Questions to be carefully answered (confidentially) by the family physician, or, if the party has no physician, or if his certificate cannot be obtained, then the following certificate to be signed by a disinterested friend:

1. How long have you been acquainted with?—Twenty years.
2. Do you see him frequently?—Yes, daily.

Have you given him medical attendance? If so, for what disease or diseases?—No.

3. Has the party any hereditary predisposition to disease to constitutional infirmity; or is he subject to pulmonary complaints, or any other complaint or disease that tends to shorten life?—No.
4. What is or has been the condition of the party's family as to conditional vigor, health, &c.?—They were hearty, and lived to old age.
5. Do you know if he has been and is now regular and temperate in his habits?—He is regular in his habits. He takes a drink as
27 any other gentleman; but I do not regard him as an intemperate man.

Dated——
Signature: (Signed) JNO. T. COX.

[For an intelligent decision as to the insurability or otherwise of applicants the trustees depend much upon the certificates of their medical examiners; they therefore expect that their answer to each question will be full, explicit, and, so far as possible, exact; and no certificate failing to conform substantially to this requirement will be accepted. The name of the person examined should in all cases be inserted, and the certificate dated.]

Certificate of the physician who has personally examined the party to be assured, in behalf of the company, and who is required to answer the following questions minutely from a strict examination at the time, and to affix his signature thereto.

N. B.—This is considered entirely confidential.

Name.—Leonidas Dillard.
Examined the 30 day of August, 1870:

1. State the height, weight, complexion, and general appearance.—5, 8 in.; 115; fair; healthy.
2. What appears to be the general habits of life as to temperance, activity, &c.?—Takes a drink occasionally; and active.
3. Are there any signs of internal or external affection of the head, or of a predisposition to it; or of paralysis, convulsions, or any other disease of the brain or nervous system?—No.
4. What is the character of the respiration as to fullness, clear-
28 ness, strength, ease, and uniformity over both lungs, and freedom from abnormal sounds, and from cough and expectoration?—Clear and healthy.

5. What is the character of the heart's action as to clearness, force, regularity, and freedom from unusual sounds?—Regular and healthy.
6. What is the character of the pulse and its rate per minute?—Regular and 80.
7. Are there any signs of disease of the stomach, bowels, liver, kidneys, or urinary organs, or of hernia?—No.
8. Are there any physical or other signs of affection of the lungs, heart, or larger blood-vessels; or any other important part or parts not included in the above questions?—No.
9. Are there any signs of previous disease or of mechanical injury?—No.
10. Is there any predisposition, either hereditary or acquired, to any local or constitutional disease?—No.
29 11. If a female, is she pregnant, how far gone, and whether first time or otherwise.
12. Opinion on the life—is it clearly first, second, or third class; and do you advise the risk?—I consider it a first-class risk.

(Signed) Signature: A. P. HARRIS, *M.D.*

[Agents are requested to give specific (confidential) answers to every one of these questions; and if they have anything else to state on forwarding the application, they must communicate it to this office.]

1. When did you last see the person whose life is proposed to be insured?—This day.
2. Are you intimately acquainted with him? If not, have you obtained such information as will enable you to answer the following questions correctly?—I have known him about four years, and think I can answer the questions satisfactorily.
3. Is he in a reputable situation of life, and of temperate habits?—As far as I know.
4. Do you consider his occupation or manner of living injurious to his health?—I do not.
30 5. Do you believe that he is now in good health and has a healthy constitution?—I do.
6. Are you aware of any particular circumstance touching his past or present health and habits of life which would make it unsafe to insure his life?—I am not.
7. Has his family, to your knowledge, been afflicted with pulmonary complaints or any other disease that tends to shorten life?—No.
8. Do you consider him in all respects a proper person to be insured, and do you recommend him as such?—I do.

Dated Edwards' Depot, Sept. 1st, 1870.

(Signed) JOHN G. YEISER,
Dist. Agent.

Filed under leave of court June 29th, 1871.

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

The State of Mississippi to the sheriff of Hinds county, greeting:

We command you to summon Dr. John Alexander, (Bolton's,)
31 A. G. Mott, (Jackson,) and W. O. Harrison, J. H. Freize, Dr. W. B. Williamson, and Dr. A. P. Harris, (Edwards' Depot,) to be and personally appear before the judge of our circuit court of the second district of Hinds County, at a court to be holden at the court-room

thereof, in the town of Raymond, on the second Monday of October, 1871, on the 5th day of the term, to give evidence in a certain case in said court pending, wherein Zenora F. Mahone et al. are plaintiffs, and the American Life Insurance Company are defendants, on the part of def'ts. Herein they shall not fail under the penalty in such cases made and provided, and have then and there this writ.

Issued the 20th day of September, 1871.

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

Received Sept. 21st, 1871.

J. L. LAKE, JR., *Sh'ff.*

Executed as to W. O. Harrison, J. H. Frieze, and W. B. Williamson, personally, Sept. 22, 1871.

J. L. LAKE, JR., *Sh'ff*,
By A. J. WILLIS, *D. S.*

Executed personally, as to Dr. J. Alexander, Sept. 26, 1871, and as to Dr. A. P. Harris, personally, Sept. 28, 1871.

J. L. LAKE, JR., *Sh'ff*,
By JOE W. JOHNSTON, *D. S.*

32 Not executed as to Mott, because of the postponement of court, Oct. 9th, 1871.

J. L. LAKE, JR., *Sh'ff*,
By A. J. WILLIS, *D. S.*

The State of Mississippi to the sheriff of Hinds County, greeting:

We command you to summon Z. T. Pittman, Benjamin Downing, H. McLinon, and John G. Yeiser, (Edwards' Depot,) to be and personally appear before the judge of our circuit court of the second district of Hinds County, at a court to be holden at the court-house thereof, in the town of Raymond, on the 2nd Monday of October, 1871, on the 5th day of the term, to give evidence in a certain case in said court pending, wherein Zenora F. Mahone et al. are plaintiffs, and the American Life Insurance Company are defendants, on the part of def't. Herein they shall not fail under the penalty in such cases made and provided. And have then and there this writ, issued the 20th day of September, 1871.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

Received Sept. 21st, 1871.

J. L. LAKE, JR., *Sh'ff.*

Executed as to Pittman and Downing, personally, Sept. 22, 1871.

J. L. LAKE, JR., *Sh'ff*,
By JOE W. JOHNSTON, *D. S.*

33 Executed personally, as to Yeiser and McLimon, Sept 29th, 1871.

J. L. LAKE, JR., *Sh'ff*,
By JOE W. JOHNSTON, *D. S.*

Plaintiffs' replications.

Circuit court for second district, to October term, 1871.

STATE OF MISSISSIPPI, *Hinds County:*

ZENORA F. MAHONE AND W. C. D. MAHONE
vs.
THE AMERICAN LIFE INSURANCE COMPANY. } 4260.

1. And for replication to the first plea pleaded by said defendants, plaintiffs say precludi non, because they say that the policy of insurance sued on was not void and of no effect, at the time the same was issued, by reason of certain false and fraudulent representations made to defendants by Leonidas Dillard, in his proposals to said defendants for the execution and issuance of said policy of insurance, and that the answer "Yes," to said question No. 5, was not made to induce said defendants to believe that said Leonidas Dillard was especially temperate and regular in his habits, as regarded the use, or drinking, of intox-
34 icating liquors, and that the said answer made by said Leonidas Dillard was not falsely and fraudulently made for the purpose of imposing upon and deceiving said defendants. On the contrary, said plaintiffs aver that the answer actually made by said Leonidas Dillard to said question No. 5 was "that he always takes his drinks," or words to that effect, and that John G. Yeiser, the authorized agent of said defendants, who took the application of said Dillard, himself wrote down the word "Yes," in answer to said question, of his own motion after said Leonidas Dillard had answered said question in the words "that he always takes his drinks," or words to that effect, that said Leonidas Dillard did not, nor did any one for him, nor did said plaintiff, answer said question "Yes," but that it was answered as aforesaid, and the said authorized agent of said company, the defendants in this action, himself substituted the word "Yes," of his own motion, for the answer so made by the said Dillard, and so wrote it in the application without the suggestion or authority of said Leonidas Dillard, or of said plaintiffs. And so the said plaintiffs say that neither did said Leoni-
35 das Dillard, or said plaintiffs, make any false or fraudulent answer to said question No. 5, for the purpose of imposing upon and deceiving said defendants, as alleged in said plea. And this they, the said plaintiffs, are ready to verify; wherefore they pray judgment, &c.

HARRIS AND WITHERS, AND
JOHN SHELTON, *Pl'ffs' Atto's.*

2. And for replication to the second plea, in this behalf pleaded by the said defendants, said plaintiffs say precludi non, because they say that the said policy of insurance sued on did not become and was void after the execution and issuing thereof, as alleged in said plea, because the said Leonidas Dillard became so far intemperate as to impair his health after the issuance of said policy of insurance, and of this they pray that due inquiry may be made by the country, &c.

HARRIS AND WITHERS AND
JOHN SHELTON, *Pl'ffs' Atto's.*

3. And for replication to the third plea, in this behalf pleaded by the said defendants, said plaintiffs say precludi non, because they

36 deny that the said policy of insurance on the life of said Leonidas Dillard, which is sued on in this action was void, and of no effect at the time of its issuance and execution, under and by reason of any certain representations alleged by the said defendants in their said third plea to have been false and fraudulent, and to have been made by said Leonidas Dillard in his proposals to said defendants for the execution and issuance of the said policy of insurance, in that, in reply to question No. 15 in said proposals, the said Leonidas Dillard answered "Insured in Equitable, $5,000," thereby intending to induce, and in fact inducing, said defendants to believe that the life of said Leonidas Dillard had been insured in the Equitable Life Insurance Company of New York; they deny that his life had not been insured by the said Equitable Life Insurance Company for any amount of money whatever; they deny that said answer was false and fraudulent and made to impose upon and deceive the said defendants and induce them to execute and issue the said policy of insurance on his life, which is the subject of this suit, improperly; and they also deny that said defendants
37 were imposed upon and deceived into the execution and issuance of the said policy of insurance, and that the same, by reason thereof, was and is void and of no effect.

And, on the contrary, they, the said plaintiffs, aver and say that said representations and said answer to said question No. 15 were honestly and truthfully made by the said Leonidas Dillard, and were in fact true, as was well known to the authorized agent of the said defendants, John G. Yeiser, and that in point of fact the life of said Leonidas Dillard had been insured in the Equitable Life Insurance Company of New York for five thousand dollars before the time when the proposals for the policy of insurance now sued on were made. And so they say that they ought not to be barred or precluded of their aforesaid action by reason of anything in said third plea contained, and of which matters they pray that due inquiry may be made by the country, &c.

HARRIS AND WITHERS AND JOHN SHELTON,
Pl'ffs' Atto's.

4. And for replication to the fourth plea filed by said defendants, said plaintiffs say that they did make proof of the death of said Leonidas Dillard before the institution of this suit, according to
38 the terms and conditions of said policy of insurance, and to the satisfaction of the agent of said defendants. And hereof they pray that due inquiry may be made by the country, &c.

HARRIS AND WITHERS AND JOHN SHELTON,
Plaintiffs' Attorneys.

Four replications, filed 6 Oct., 1871.

N. HODGE, *C'lk*,
By B. F. EDWARDS, *D. C.*

The State of Mississippi to the sheriff of Madison County, greeting:

We command you to summon John Dillard (near Vernon) to be and personally appear before the judge of our circuit court of the second district of Hinds County, at a court to be holden at the court-house thereof, in the town of Raymond, on the 11th Monday after the 4th Monday of Nov'r, 1871, on the 6th day of the term, to give evidence in a certain case in said court pending, wherein Z. F. Mahone et al. are plaintiffs, and American Life Insurance Company are defendants, on

the part of def'ts. Herein he shall not fail under the penalty in such cases made and provided. And have then and there this writ. Issued this 26th day of January, 1872.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

39 Rec'd 30th Jan'y, 1872. R. J. Ross, sh'ff.
Executed in person by reading to John Dillard this Feb'ry 8th, 1872.

R. J. ROSS, *Sh'ff*,
By T. F. LEONARD, *D. S.*

The State of Mississippi to the sheriff of Hinds County, greeting:

We command you to summon Dr. John Alexander, Dr. W. B. Williamson, Dr. A. P. Harris, A. G. Mott, W. O. Harrison, and J. H. Frieze to be and personally appear before the judge of our circuit court, to be holden at the court-house thereof, in the town of Raymond, on the 11th Monday after the 4th Monday of Nov'r, 1871, on the 6th day of the term, to give evidence in a certain case in said court pending, wherein Z. F. Mahone et al. are plaintiffs and American Life Insurance Company are defendants, on the part of def'ts. Herein they shall not fail under the penalty in such cases made and provided. And have then and there this writ.

Issued the 26th day of January, 1872.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

Received 27th Jan'y, 1872.

J. M. COATS, *Sh'ff.*

40 Executed this s'p'a on Dr. John Alexander, personally, Feb'ry 5th, 1872.

J. M. COATS, *Sh'ff*,
By J. C. FAIRCHILD, *D. S.*

Executed this s'p'a on Dr. A. P. Harris, W. O. Harrison, and J. H. Frieze, and Dr. W. B. Williamson, personally, Feb'ry 6th, 1872.

J. M. COATS, *Sh'ff*,
By J. C. FAIRCHILD, *D. S.*

A. G. Mott cannot be found in my county, 10th Feb'y, 1872.

J. M. COATS, *Sh'ff*,
By J. B. FAIRCHILD, *D. S.*

The State of Mississippi to the sheriff of Hinds County, greeting:

We command you to summon Z. F. Pittman, Ben Downing, M. McLinon, John G. Yeiser, Nat. McGowan, colored, (Edwards',) and Patrick Bradly, (4-Mile Creek,) to be and personally appear before the judge of our circuit court of the second district of Hinds County, at a court to be holden at the court-house thereof, in the town of Raymond, on the 11th Monday after the 4th Monday of Nov'r, 1871, on the 6th day of the term, to give evidence in a certain case in said court pending, wherein Z. F. Mahone et al. are plaintiffs, and American Life Insurance

36 deny that the said policy of nsurance on the life of said Leonidas Dillard, which is sued on in this action was void, and of no effect at the time of its issuance and execution, under and by reason of any certain representations alleged by the said defendants in their said third plea to have been false and fraudulent, and to have been made by said Leonidas Dillard in his proposals to said defendants for the execution and issuance of the said policy of insurance, in that, in reply to question No. 15 in said proposals, the said Leonidas Dillard answered "Insured in Equitable, $5,000," thereby intending to induce, and in fact inducing, said defendants to believe that the life of said Leonidas Dillard had been insured in the Equitable Life Insurance Company of New York; they deny that his life had not been insured by the said Equitable Life Insurance Company for any amount of money whatever; they deny that said answer was false and fraudulent and made to impose upon and deceive the said defendants and induce them to execute and issue the said policy of insurance on his life, which is the subject of this suit, improperly; and they also deny that said defendants
37 were imposed upon and deceived into the execution and issuance of the said policy of insurance, and that the same, by reason thereof, was and is void and of no effect.

And, on the contrary, they, the said plaintiffs, aver and say that said representations and said answer to said question No. 15 were honestly and truthfully made by the said Leonidas Dillard, and were in fact true, as was well known to the authorized agent of the said defendants, John G. Yeiser, and that in point of fact the life of said Leonidas Dillard had been insured in the Equitable Life Insurance Company of New York for five thousand dollars before the time when the proposals for the policy of insurance now sued on were made. And so they say that they ought not to be barred or precluded of their aforesaid action by reason of anything in said third plea contained, and of which matters they pray that due inquiry may be made by the country, &c.

HARRIS AND WITHERS AND JOHN SHELTON,
Pl'ffs' Atto's.

4. And for replication to the fourth plea filed by said defendants, said plaintiffs say that they did make proof of the death of said Leonidas Dillard before the institution of this suit, according to
38 the terms and conditions of said policy of insurance, and to the satisfaction of the agent of said defendants. And hereof they pray that due inquiry may be made by the country, &c.

HARRIS AND WITHERS AND JOHN SHELTON,
Plaintiffs' Attorneys.

Four replications, filed 6 Oct., 1871.

N. HODGE, *C'lk*,
By B. F. EDWARDS, *D. C.*

The State of Mississippi to the sheriff of Madison County, greeting:

We command you to summon John Dillard (near Vernon) to be and personally appear before the judge of our circuit court of the second district of Hinds County, at a court to be holden at the court-house thereof, in the town of Raymond, on the 11th Monday after the 4th Monday of Nov'r, 1871, on the 6th day of the term, to give evidence in a certain case in said court pending, wherein Z. F. Mahone et al. are plaintiffs, and American Life Insurance Company are defendants, on

the part of def'ts. Herein he shall not fail under the penalty in such cases made and provided. And have then and there this writ. Issued this 26th day of January, 1872.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

39 Rec'd 30th Jan'y, 1872. R. J. Ross, sh'ff.
Executed in person by reading to John Dillard this Feb'ry 8th, 1872.

R. J. ROSS, *Sh'ff*,
By T. F. LEONARD, *D. S.*

The State of Mississippi to the sheriff of Hinds County, greeting:

We command you to summon Dr. John Alexander, Dr. W. B. Williamson, Dr. A. P. Harris, A. G. Mott, W. O. Harrison, and J. H. Frieze to be and personally appear before the judge of our circuit court, to be holden at the court-house thereof, in the town of Raymond, on the 11th Monday after the 4th Monday of Nov'r, 1871, on the 6th day of the term, to give evidence in a certain case in said court pending, wherein Z. F. Mahone et al. are plaintiffs and American Life Insurance Company are defendants, on the part of def'ts. Herein they shall not fail under the penalty in such cases made and provided. And have then and there this writ.

Issued the 26th day of January, 1872.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

Received 27th Jan'y, 1872.

J. M. COATS, *Sh'ff.*

40 Executed this s'p'a on Dr. John Alexander, personally, Feb'ry 5th, 1872.

J. M. COATS, *Sh'ff*,
By J. C. FAIRCHILD, *D. S.*

Executed this s'p'a on Dr. A. P. Harris, W. O. Harrison, and J. H. Frieze, and Dr. W. B. Williamson, personally, Feb'ry 6th, 1872.

J. M. COATS, *Sh'ff*,
By J. C. FAIRCHILD, *D. S.*

A. G. Mott cannot be found in my county, 10th Feb'y, 1872.

J. M. COATS, *Sh'ff*,
By J. B. FAIRCHILD, *D. S.*

The State of Mississippi to the sheriff of Hinds County, greeting:

We command you to summon Z. F. Pittman, Ben Downing, M. McLinon, John G. Yeiser, Nat. McGowan, colored, (Edwards',) and Patrick Bradly, (4-Mile Creek,) to be and personally appear before the judge of our circuit court of the second district of Hinds County, at a court to be holden at the court-house thereof, in the town of Raymond, on the 11th Monday after the 4th Monday of Nov'r, 1871, on the 6th day of the term, to give evidence in a certain case in said court pending, wherein Z. F. Mahone et al. are plaintiffs, and American Life Insurance

41 Company are defendants, on the part of def'ts. Herein they shall not fail under the penalty in such cases made and provided. And have then and there this writ.

Issued the 26th day of January, 1872.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

Received 27th Jan'y, 1872.

J. M. COATS, *Sh'ff.*

Executed this s'p'a on Z. F. Pittman, Ben Downing, and Nat. McGowan, personally, Feb'ry 6th, 1872.

J. M. COATS, *Sh'ff*,
By J. C. FAIRCHILD, *D. S.*

Executed this s'p'a on John G. Yeiser, in person, Feb'ry 9th, 1872.

J. M. COATS, *Sh'ff*,
By J. C. FAIRCHILD, *D. S.*

Neither M. McLinon nor Patrick Bradly can*not* be found in my county, after diligent search for them. 15 Feb'ry, 1872.

J. M. COATS, *Sh'ff*,
By J. B. FAIRCHILD, *D. S.*

The State of Mississippi to the sheriff of Warren County, greeting:

We command you to summon W. M. Chamberlin to be and personally appear before the judge of our circuit court of the second district
42 of Hinds County, at a court to be holden at the court-house thereof, in the town of Raymond, on the 11th Monday after the 4th Monday of Nov'r, 1871, on the 6th day of the term, to give evidence in a certain case in said court pending, wherein Z. F. Mahone et al. are plaintiffs and American Life Insurance Company are defendants, on the part of def'ts. Herein they shall not fail under the penalty in such cases made and provided. And have then and there this writ.

Issued the 26th day of January, 1872.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

Rec'd Jan'y 30th, '72.

CHA'S E. FURLONG, *Sh'ff.*

Executed on the within-named W. M. Chamberlin, personally, this 30th day of January, A. D. 1872.

CHA'S E. FURLONG, *Sh'ff.*
CHA'S H. SMITH, *D. S.*

February term, 1872.—4th day, 15th February, 1872.

Z. F. MAHONE
vs.
AM. LIFE INS. CO. } 4260.

By agreement of the parties, by their attorneys, and with the assent of the court, this cause is specially set for the second Thursday of the term.

43 The State of Mississippi to the sheriff of Hinds County, greeting:

We command you to summon Jane Bright, (colored,) Minda Brown, (colored,) W'm L. Roberts, A. A. Roberts, Joshua Warrenton, and John G. Yeiser, Henry Smothers, Louisa Marshall, to be and personally appear before the judge of our circuit court of the second district of Hinds County, at a court now sitting at the court-house thereof, in the town of Raymond, and which began its session on the 2nd Monday of Feb'y, 1872, on the 10th day of the term, to give evidence in a certain case in said court pending, wherein Mrs. Zenora F. Mahone is plaintiff and The American Life Insurance Company is defendant, on the part of plaintiff. Herein you shall not fail under the penalty in such case made and provided. And have then and there this writ.

Issued the 15th day of Feb'ry, 1872.

Attest:

N. HODGE, *Clerk.*

We acknowledge service of the within subpœna this 17th day of February, 1872.

JANE BRIGHT.
W. L. ROBERTS.
MINDA BROWN.
A. A. ROBERTS.

44 The State of Mississippi to the sheriff of Hinds County, greeting:

We command you to summon W'm B. Stewart, James Gary, Wash. Robinson, Eli McMullen, Wash. Black, (col'd,) W. T. Mahone, John T. Cox, and W. W. Nesmith, to be and personally appear before the judge of our circuit court of the second district of Hinds County, at a court now sitting at the court-house thereof, in the town of Raymond, and which began its session on the 2nd Monday of Febr'y, 1872, on the 10 day of the term, to give evidence in a certain case in said court pending, wherein Mrs. Zenora F. Mahone is plaintiff and the American Life Insurance Company is defendant, on the part of plaintiff. Herein you shall not fail under the penalty in such cases made and provided, and have then and there this writ.

Issued the 15 day of Febr'y, 1872.

Attest: N. HODGE, *Clerk.*

We hereby acknowledge service of the within subpœna this 16th day of February, 1872.

W. B. STEWART.
ELI McMULLEN.
W. W. MAHONE.
W. W. NESMITH.
JAMES GARY.
WASH BLACK.
JOHN T. COX.

45 February term, 1872, 10th day, 22nd February, 1872.

ZENORA F. MAHONE ET AL.
vs. } 4260.
AMERICAN LIFE INSURANCE COMPANY.

The demurrer of the defendants to the replication of plaintiffs to their

first plea being argued by counsel and considered by the court, it is ordered that said demurrer be sustained, and that plaintiffs have leave to reply over to said first plea.

(The demurrer referred to in the foregoing order is not on file in the papers in this case, and therefore not copied herein.)

Plaintiffs' replication to 1st plea.

Circuit court for 2nd district, February term, A. D. 1872.

STATE OF MISSISSIPPI,
County of Hinds:

ZENORA F. MAHONE AND W. C. D. MAHONE
vs. } 4260.
THE AMERICAN LIFE INSURANCE COMPANY.

And for replication to the first plea pleaded by said defendants, said plaintiffs, by leave of court first had and obtained, on sustaining
46 defendants' demurrer to the replication heretofore filed by said plaintiffs to said first plea, say "precludi non," because they say that the said policy of insurance sued on was not void and of no effect at the time the same was executed and issued by def't's, by reason of certain false and fraudulent representations made to defendants by the said Leonidas Dillard, in his proposal to them for the execution and issuance by them of said policy of insurance in manner and form as alleged in said plea.

And plaintiffs deny that said Leonidas Dillard made any false or fraudulent answer to said question No. 5, for the purpose of imposing upon and deceiving said defendants and inducing them to issue said policy of insurance, or that said defendants were imposed upon and deceived into the execution and issuance of said policy of insurance by said Leonidas Dillard by reason thereof, in manner and form as alleged in said plea, and of this they put themselves upon the country.

W'M T. WITHERS, *P. Q.*

47 Messrs. T. J. and F. A. R. Wharton and Semmes, attorneys of record for defendants.

You will please take notice that on the trial of the above case on the first plea and above replication thereto, we will offer evidence to prove that Leonidas Dillard did not answer "yes," to question number 5, in the application referred to, but that, on the contrary, his answer to said question No. 5, was that "so far as drinking is concerned, I never refuse," or words to that effect; that the answer "yes," was written down by John G. Yeiser, the district agent for this district of said insurance company, without the knowledge or consent of said Leonidas Dillard, or of said plaintiffs, and that after said John G. Yeiser, agent of def't's as af's'd, had finished writing the answer, that they were never read over to said Dillard, or to plaintiffs, and that Dillard signed them without ever reading them over, and without knowing that his said above answer to said question No. 5, had been written down by said Yeiser "yes," instead of as he answered it. Plaintiffs will offer evidence to prove that plaintiff, W. C. D. Mahone, as agent for his wife,
48 Zenora F. Mahone, in effecting said insurance on the life of her brother for her benefit, told John G. Yeiser, agent as aforesaid, when said Dillard had answered question No. 5, as hereinbefore stated,

to write down the answer "he always takes his drinks," or words to that effect, and that said Yeiser, ag't as af's'd, notwithstanding the request of said pl'tff, did not write down the answer "he always takes his drinks," or he "never refuses," as answered by Dillard, but of his own motion and without the knowledge, consent, or approbation of said Dillard or of s'd plaintiffs, or either of them, wrote the answer "yes," to said question No. 5, without the knowledge or consent of said Dillard of said plaintiffs.

They will further offer evidence to show that said Yeiser, ag't as af's'd, informed Dillard and pl't'ff W. C. D. Mahone, act'g as ag't for his said wife as af's'd, that said question No. 5 had reference to the habits of said Dillard as to sleeping and eating, and that the answer thereto was a matter of form and of no importance, or of small importance, or words to that effect, and if the answer "yes" was at any time given to
49 said question No. 5, it was solely and entirely with reference to the habits of Dillard in eating and sleeping, and not with reference to drinking.

W'M T. WITHERS, *P. Q.*

Filed by leave of court 22nd February, 1872.

N. HODGE, *Clk*,
By B. F. EDWARDS, *D. C.*

Def'ts' rejoinder to pl'ff's' rep. to 1st plea.

In the circuit court for the second district of Hinds County, Mississippi.

ZENORA F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE. } 4260.

And said defendants, by their attorneys, as to said replication of said plaintiffs, filed, under leave of court, to said first plea of said defendants in this behalf, and whereof said plaintiffs pray inquiry by the country, &c., do the like, &c.

B. J. SEMMES, AND
T. J. AND F. A. R. WHARTON,
Atto's for Defendants.

The plaintiffs or their attorneys of record will take notice that, on the trial of the above-stated cause, and under their first plea,
50 and under their rejoinder to the replication of said plaintiffs to said first plea, said defendants will offer, before the jury, evidence in rebuttal of each of the special matters stated in the notice of said plaintiffs, under their said replication to said first plea; and also to prove that said Leonidas Dillard was advised, informed, or understood before he signed said application for insurance on his life, which is refer'ed to in said first plea, and in said replication thereto, that his answer to said question No. 5, therein refer'ed to, had been written down "yes," as stated in said first plea.

B. J. SEMMES, AND
T. J. AND F. A. R. WHARTON,
Atto's for Defendants.

Filed February 26th, 1872.

N. HODGE, *Clk.*

The State of Mississippi to the sheriff of Hinds County, greeting:

We command you to summon A. G. Matt, (near Brownsville,) to be and personally appear before the judge of our circuit court of the
51 second district of Hinds County, at a court which began its session at the court-house thereof, in the town of Raymond, on the 2nd Monday of February, 1872, on the 17th day of the term, being the 1st day of March, 1872, to give evidence in a certain case in said court pending, wherein Z. F. Mahone et al. are plaintiffs and The American Life Insurance Company are defendants, on the part of pl't'ffs. Herein he shall not fail, under the penalty in such case made and provided; and have then and there this writ.

Witness my hand this the 26th day of February, 1872.

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

Rec'd 26th Feb'y, 1872.

J. M. COATS, *Sh'ff.*

A. G. Mott cannot be found (after diligent search for him) in my county, 1st March, 1872.

J. M. COATS, *Sh'ff*,
By M. H. SIVLY, *D. S.*

Plaintiffs' notice to defendants to produce papers:

ZENORA F. MAHONE
vs.
AMERICAN LIFE INSURANCE COMPANY. } 4260.

52 The defendant, or their attorneys of record, will take notice that they are required to produce the written and printed proofs of death of Leonidas Dillard, furnished the said company by Mrs. Zenora F. Mahone, and now in their possession, and in default thereof that plaintiff will introduce p'rol evidence to establish their contents.

HARRIS AND WITHERS,
For Defend't.

Filed March 1st, 1872.

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

Admissions of plaintiffs as to evidence of J. G. Yeiser.

In the circuit court for the second district of Hinds County, Mississippi, at February term, 1872.

Z. F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE COMPANY. }

It is admitted by counsel for the plaintiff in the above-stated cause that John G. Yeiser would state before the jury, if present, as a witness, as follows: That he was the agent for the defendants in the above-stated cause at the time Leonidas Dillard made his application to said American Life Insurance Company for insurance on his life, and

53 upon which the policy of insurance sued on in the above-stated was issued; that said application was partly in print and partly in writing, the answers of said Dillard to the printed questions therein being in his writing; that each of said answers of said Dillard to said printed questions in said proposal for said insurance was reduced to writing by said Yeiser as such agent, after he had distinctly read over to said Leonidas Dillard each of said printed questions, to which his said answer, as written down in said application for insurance, respectively applies; and after said Leonidas Dillard had directed him what answer to write down to each of said printed questions, as said printed questions were respectively carefully read over to said Leonidas Dillard by said J. G. Yeiser, as such agent for said American Life Insurance Company; that each of said printed questions, as so read over to said Leonidas Dillard by said J. G. Yeiser, was, at the time, and before such answers thereto had been so written down, fully explained by said Yeiser to said Leonidas Dillard, and, at said time, and before his said answers thereto were so written down by said Yeiser, then fully understood by said Dillard; that, after all
54 of said answers of said Leonidas Dillard to said printed questions contained in his said proposal for insurance by said American Life Insurance Company, on the life of said Leonidas Dillard, had been so written down by said Yeiser, in the presence of and by the directions of said Leonidas Dillard, said printed questions, and the said written answers thereto of said Leonidas Dillard, were carefully read over to said Leonidas Dillard by said J. G. Yeiser as the agent of said American Life Insurance Company, and that, thereupon, and with a full knowledge as to each of said questions, and of each of his answers thereto, as then so written down, said Leonidas Dillard then signed his name to said application for said insurance in the presence of said J. G. Yeiser, as such agent, and thereupon, and after so signing his name to said application for insurance, the said Leonidas Dillard delivered said application to said J. G. Yeiser, as such agent, to be by him forwarded to said American Life Insurance Company, for the purpose of inducing said insurance company to issue a policy of insurance on his life as applied for in said application for such insurance. That said Yeiser, as such agent,
55 accordingly forwarded this application to said American Life Insurance Company for the purpose of inducing them to issue a policy for the insurance of the life of said Leonidas Dillard as prayed for in said application for such insurance; and that it was upon the faith and credit of the written answers of said Leonidas Dillard to said printed questions in said proposals for the insurance of his life, that the policy of insurance sued on in this case was issued by said American Life Insurance Company. That at the time he, said Yeiser, as such agent, read over to said Leonidas Dillard the printed question number 5, in said application for said insurance on his life, which is in the following words, to wit: "Is the party temperate and regular in his habits," he, said Yeiser, fully and carefully explained to said Leonidas Dillard that said question refer'ed to his habits as to temperance in the use of intoxicating liquors, and not as to his habits of eating or sleeping; and that said written answer of said Leonidas Dillard "Yes," to said printed question No. 5, in said application for such insurance by said *said* Leonidas Dillard, had reference entirely to his use of taking or
56 drinking intoxicating liquors, and not to his habits of eating and sleeping. Further, it is admitted by counsel for said plaintiffs that said J. G. Yeiser would state as a witness before the jury, if present, that if, at the time said Leonidas Dillard so signed and delivered to him

his said application for insurance on his life, he, said Yeiser, had known that said Leonidas Dillard was then addicted to the habit of using or drinking spirituous liquors to such an extent as occasionally to produce intoxication, or a state or condition of drunkenness, that he, said Yeiser, as agent aforesaid, would not have forwarded to said American Life Insurance Company the said proposal of said Leonidas Dillard for such insurance on his life, as therein asked for, and would not then have recommended to said American Life Insurance Company the said Leonidas Dillard as a proper person in all respects to be then insured by *by* said American Life Insurance Company.

HARRIS AND WITHERS,
March 1st, 1872. *For Plaintiffs.*

It is furthered admitted by said plaintiffs that said John G. Yeiser would testify before the jury, if present, that the paper hereto
57 annexed and marked Exhibit A, to this admission, is the original application of said Leonidas Dillard for insurance on his life which is refer'ed to in the foregoing admission; and that the names of Leonidas Dillard thereto subscribed were, at the time stated in the foregoing admission, written by the said Leonidas Dillard, both on the first and second pages thereof; and that the names of Jno. G. Yeiser, dis't ag't, and Jno. G. Yeiser, were at the same time written by said Jno. G. Yeiser on said first and second page thereof. And that the said Exhibit A, before refer'ed to, is the original application so forwarded to said American Life Insurance Company, as stated in the foregoing admission, and upon which the policy of insurance sued on in this case was issued.

HARRIS AND WITHERS,
March 1st, 1872. *For* Def'ts.

AMERICAN LIFE INSURANCE COMPANY,
Proposals for Insurance:

The agent is requested to be particular to have all the ques-
58 tions in this application carefully answered, dates filled up and signed by the applicant, and witnessed.

On margin: 1st and 2nd pages here of Exhibit A, to admissions of Harris and Withers, attorneys for Zenora F. Mahone, hereto attached.

Acclimated by reason of life-time residence.

[The first two questions will have the same answer when the applicant insures his own life—different when he insures the life of another.]

1st. What is the name and residence of the person for whose benefit the insurance is to be effected?

If a married female, or widow, state names in full, and also her maiden name. State Christian names in full.

Zenora Florid' Mahone, Hinds Co., Miss'i, married; Zenora Florida Dillard.

2. What is the name, residence, and occupation or trade of the person whose life is proposed to be insured? (See note above.)

Leonidas Dillard—farming.

3. Place and date of birth of the life proposed for insurance; State, county, and town; age next birth day.

Born at Summerville, Russell County, on the 29th day of March, 1839; 31.

4. Are the party's parents living? If not, at what age, and of what disease did they die? State full name of the father.

Father; dead; 72 years; old age.
Mother; dead; 60 " ; fever.

5. Is the party temperate and regular in his habits?
Yes.

59 6th. Has the party had the small-pox, or been vaccinated?
Has not had small-pox; been vaccinated.

7. Has the party at any time been afflicted with insanity, gout, asthma, scrofula, convulsions, palsy, appoplexy, consumption, spitting of blood, or any disease of the lungs or throat whatever, or any other disease likely to impair his constitution or shorten life, or been afflicted with disease of the heart, or of the urinary organs? If so, which.
No.

8. Has the party's father, mother, brother, or sister been afflicted with consumption, or any other disease of the lungs, or any other serious family disease, such as scrofula, insanity, &c., &c.?
No.

9. Has the party experienced any wound, hurt, or other serious bodily injury?
No.

10. Is the party now in good health, and does he usually enjoy good health?
Yes.

11. Name and residence of the said party's usual medical attendant,
60 to be referred to for information as to the past and general state of health, and how long has he known the party? If no medical attendant, name and residence of an intimate friend, competent to give the required information.
Jno. T. Cox—friend—has known him 20 years.

12. Is there any circumstance which renders an insurance on his life more than usually hazardous, such as place of residence, occupation, hereditary predisposition, constitutional infirmity, or other known cause, or any other circumstance or information with which the company ought to be made acquainted?
No.

13. Sum to be insured—(write words in full.)
Premium, how payable?
Five thousand ($5,000) doll's; semi-annually.

14. Term for which the insurance is required?
Life.

15. Has a proposal been made for insuring the life in this, or at any other office; and, if so, whether accepted or declined? If insured, state in what company, and for what amount.
Insured in Equitable, $5,000.

16. Is the applicant aware that any untrue or fraudulent answers to
61 the above queries, or any suppression of facts in regard to health, or habits, or circumstances, or neglect to pay the premium on or before the day it becomes due, will vitiate the policy, and forfeit all payments made thereon?
Yes.

17. What plan of insurance is desired?
Ord. life—Table No. 6.
Dated at Edwards' Depot this 30 day of Aug't, 1870.
(Signature) LEONIDAS DILLARD.

Witness:
JNO. G. YEISER, *Dis't Ag't.*

Declaration.

I do hereby declare that my age does not exceed 31 years; that I am now in good health, and do ordinarily enjoy good health, and in the foregoing proposals I have not withheld any material circumstance or information touching the past or present state of health or habits of life , with which the American Life Insurance Company ought to be made acquainted.

And I do hereby agree that this declaration, and the foregoing proposals, shall be the basis and conditions of the contract between myself and the said company; and if at any time hereafter the company
62 shall discover that any fraudulent or untrue allegation be contained herein, or in the proposals, or any material misstatement of facts regarding the condition or health of the party insured, then, in any and every such case, the said company may refuse to receive further premiums on such insurance, and all moneys paid on account of the same shall be forfeited to the said company, and the policy of insurance made on the faith of this declaration, and the proposals, shall become null, void, and of none effect.

The agent is requested to have this declaration carefully filled up and signed by the applicant, and witnessed.

Dated at Edwards' Depot, Miss'i, this 30 day of August, A. D. 1870.

(Signature) LEONIDAS DILLARD.

Witness: JNO. G. YEISER.

Questions to be carefully answered (confidentially) by the family physician, or if the party has no physician, or if his certificate cannot be obtained, then the following certificate to be signed by a disinterested friend.

1. How long have you been acquainted with ?

Twenty years.

2. Do you see him frequently?

Yes, daily.

63 Have you given him medical attendance? If so, for what disease or diseases?

No.

3. Has the party any hereditary predisposition to disease, to constitutional infirmity, or is he subject to pulmonary complaints, or any other complaint or disease that tends to shorten life?

No.

4. What is, or has been, the condition of the party's family as to constitutional vigor, health, &c.?

They were healthy and lived to old age.

5. Do you know if he has been, and is now, regular and temperate in his habits?

He is regular in his habits. He takes a drink as any other gentleman, but I do not regard him as an intemperate man.

(Signature) JOHN T. COX.

Dated———

Certificate of the physician who has personally examined the party to be insured, in behalf of the company, and who is required to answer the following questions minutely from a strict examination at the time, and to affix his signature thereto.

64 [For an intelligent decision as to the insurability, or otherwise, of applicant, the trustees depend much upon the certificates of their medical examiners. They therefore expect that their answer to each question will be full, explicit, and, so far as possible, exact; and no certificate failing to conform substantially to this requirement will be accepted. The name of the person examined should, in all cases, be inserted, and the certificate dated.]

N. B.—This is considered entirely confidential.
Name, Leonidas Dillard, examined the 30th day of August, 1870.

1. State the height, weight, complexion, and general appearance.
5, 8 in.; 115; fair; healthy.
2. What appears to be the general habits of life as to temperance, activity, &c.
Takes a drink occasionally, and is active.
3. Are there any signs of internal or external affection of the head, or of a predisposition to it, or of paralysis, convulsions, or any other disease of the brain, or nervous system?
No.
4. What is the character of the respiration, as to fullness, clearness, strength, ease, and uniformity over both lungs, and freedom from abnormal sounds, and from coughs and expectoration?
Clear and healthy.
5. What is the character of the heart's action, as to clearness, force, regularity, and freedom from unusual sounds?
Regular and healthy.
6. What is the character of the pulse and its rate per minute?
Regular and 80.
7. Are there any signs of disease of the stomach, bowels, liver,
65 kidneys, or urinary organs, or hernia?
No.
8. Are there any physical or other signs of affection of the lungs, heart, or larger blood-vessels, or of any other important part or parts not included in the above questions?
No.
9. Are they any signs of previous disease or of mechanical injury?
No.
10. Is there any predisposition, either hereditary or acquired, to any local or constitutional disease?
No.
11. If a female, is she pregnant; how far gone, and whether first time or otherwise?
12. Opinion on the life: Is it clearly first, second, or third class, and do you advise the risk?
I consider it a first-class risk.
(Signature) A. P. HARRIS, *M. D.*

Agents are requested to give specific (confidential) answers to every one of these questions, and if they have anything else to state, on forwarding the application, they must communicate it to the office.
66 1. When did you last see the person whose life is proposed to be insured?
This day.
2. Are you intimately acquainted with him? If not, have you ob-

tained such information as will enable you to answer the following questions correctly?

I have known him about four years, and think I can answer the questions satisfactorily.

3. Is he in a reputable situation of life, and of temperate habits?

As far as I know.

4. Do you consider his occupation or manner of living injurious to his health?

I do not.

5. Do you believe that he is now in good health, and has a healthy constitution?

I do.

6. Are you aware of any particular circumstance touching his past or present health and habits of life, which would make it unsafe to insure his life?

I am not.

7. Has his family, to your knowledge, been afflicted with pulmonary complaints, or any other disease that tends to shorten life?

No.

67 8. Do you consider him in all respects a proper person to be insured, and you recommend him as such?

I do.

Dated Edwards' Depot, Sept. 1st, 1870.

JNO. G. YEISER, *Dist. Agent.*

(Indorsed:) J. Stock v. American Life Insurance Company, office Walnut street, S. E. cor. Fourth, Philad'a. Policy No. 25,999. Date of policy, Aug. 30, 1870. Declaration dated Aug. 30, 1870. Sister. Benefit of Zenora Florida Mahone. Residence, Hinds Co., Miss. Life of Leonidas Dillard. Occupation, farmer. Age next birth-day, 31. Term of life. Sum insured, $5,000. Bond premium, $43.77. Policy fee and U. S. tax, 1.50—$45.27. C. Handy, agent. S. B. M., June 20, '71. Residence, . N. B.—The agent is requested not to fill up the above blanks. S. B. M. Oct. 24. [Erased, S. B. M. Sept. 10.] Filed 1st March, 1872. N. Hodge, c'lk, by B. F. Edwards, D. C.

68 *Pl'ff's admission as to evidence of W. M. Chamberlin.*

In the circuit court for the second district of Hinds *of Hinds* County, Mississippi.

ZENORA F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE *County.*

We hereby agree to admit that W. M. Chamberlin would, if present, testify before the jury as follows: That he was agent at Vicksburg, Miss'i, of the Equitable Life Assurance Society, the chief office of which is located in the city of New York, from June, 1869, up to the 28th day of February, 1871; that, on the 25 day of July, 1870, Leonidas Dillard, then a citizen of said Hinds County, made an application to said life assurance society, through him as such agent, for an insurance on his own life, in favor of Mrs. Zenora Florida Mahone, for the sum of $5,000.00; that said Chamberlin, as such agent, forwarded said application to said chief office of said life assurance company at the city of New York, for their action thereon, and said chief office of said life assurance company

declined or refused to issue a policy of insurance as asked for in said application; and that said Chamberlin would also state that the life of said Leonidas Dillard was not insured for any sum of money whatever, or for the benefit of any person whatever, on the 30th day of August, 1870, in said Equitable Life Assurance Society; and also that said application for such insurance on the life of said Leonidas Dillard is now in possession of life assurance society in the city of New York; that the said application was first made to renew a policy said to have been issued about two years previously, in 1868, and that at his (Chamberlin's) suggestion, a regular application was made for a new policy instead of renewal of old, as it would cost more to renew an old one than to take out a new one. The register of the Co., then in his (Chamberlin') possession, showed that an appliication had been made to the said Equitable Society in 1868 for a policy on the life of Leonidas Dillard.

69

HARRIS AND WITHERS,
Atty's for Plaintiffs.

Filed 1st March, 1872.

N. HODGE, *Clk*,
By B. F. EDWARDS, *D. C.*

70 *Admission by defendants.*

ZENORA F. MAHONE ET AL.
vs.
AMERICAN LIFE INS. Co. } 4260.

It is admitted that John G. Yeiser, if present, would swear that he and one Finney, as agents of the Equitable Life Ins. Society of New York, took an application from Leonidas Dillard in 1868 or 1869 for insurance of his life for $5,000 for benefit of Z. F. Mahone, and that a policy was issued on said application for $5,000 on the life of said Dillard, and that two premiums were paid on it, but that said policy lapsed before the 30th of August, 1870, on account of failure of Dillard to pay the stipulated premiums.

CHARLES HANDY & CO.,
Gen'l Ag't American Life Ins. Co. for State of Mississippi.

Mahone 1.
Dillard died Nov'r, 1870. Immediately gave notice to physician.

Filed 1st March, 1872.

N. HODGE, *Clk*,
By B. F. EDWARDS, *D. C.*

71 Number 25,999.] [Dollars, 5,000.

AMERICAN LIFE INSURANCE COMPANY, PHILADELPHIA.

Charter perpetual.] [Incorporated 1850.

(On margin :) All restrictions as to travel and residence removed.

This policy of insurance witnesseth: That the American Life Insurance Company, in consideration of the payment of forty-three $\frac{77}{100}$ dollars, and of the further premium of forty-three $\frac{77}{100}$ dollars, to be paid semi-annually hereafter, to wit, on the thirtieth day of August and last

day of February in each and every year, always in advance, do assure the life of Leonidas Dillard, of county of Hinds, State of Mississippi, in the sum of five thousand dollars, for the term of his natural life.

And the said company do hereby promise and agree well and truly to pay, or cause to be paid, the said sum insured to Zenora F. Mahone, sister of said Leonidas Dillard, her executors, administrators, and assigns, within sixty days after due notice and satisfactory proof of the death of the said Leonidas Dillard, or when he shall have attained the age of eighty years, first deducting any indebtedness to the company, and any unpaid balance on the premium of the current year;

72 provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the insured upon these express conditions, that in case the said Leonidas Dillard shall, without the consent of this company, previously obtained, visit those parts of the United States which lie south of 32 degrees of north latitude, between the first of June and the first of November, enter into any military or naval service whatsoever, (the militia not in actual service excepted,) or shall, without such previous consent, be personally employed as an engineer or fireman in running a locomotive or steam engine, or as a conductor, brakeman, or hand upon a railroad, or as an officer, hand, or servant of any steam-vessel, or as a miner or hand in any coal or other mine, or in the manufacture or transportation of gunpowder; or in case he shall become so far intemperate as to impair his health or induce delirium tremens, or shall die by his own hand, whether sane or insane, or in consequence of a duel, or by the hands of justice, or in the known violation of any law of any of these States, or of the United States, or of any State or country, this policy

73 shall be void, null, and of no effect.

And it is hereby declared and agreed, that if the proposals, answers, and declarations made by the said Leonidas Dillard, and bearing date the 30 day of August, 1870, upon the full faith of which this policy is issued, shall be found to be fraudulent or untrue in any respect, or that there is any wilful misrepresentations or concealment in said declarations, or in case the said premiums are not paid, as hereinbefore mentioned, on or before 12 o'clock (noon) on the several days specified and appointed for the payment of the same, then this policy shall be void, and of no effect; and all payments made shall be forfeited to the company.

And it is hereby declared and agreed, that if at any time after three full annual premiums have been paid upon this policy it shall be surrendered while yet in force, the company will issue a paid-up non-forfeiture policy therefor for such an amount as the then present value of the policy would purchase as a single premium. And it is also agreed that this policy, and the insurance hereby effected, shall be sub-

74 ject to the several conditions and regulations printed on the back hereof, so far as the same can be applicable, in the same manner as if the same respectively were incorporated in this policy.

No assignment of this policy shall be of any force or effect unless approved by the company, and endorsed thereon by the secretary, or other authorized officer, within thirty days from the date thereof; otherwise, the premium shall be considered sunk for the benefit of the company.

This policy shall not be valid until the actual payment of the premium has been made in cash, and receipted for at the bottom of this policy by C. Handy, agent for Mississippi.

In witness whereof the president of the said American Life Insurance Company, on behalf of the board of trustees, has hereunto subscribed

his name, attested by the secretary, and caused the common seal of said company to be affixed, at the office in Philadelphia, this the thirtieth day of August, eighteen hundred and seventy.

[L. S.] A. WILDAIR, *President.*
Attest: JOHN S. WILSON, *Secretary.*

[Fifty cents United States internal revenue.]

Received, Canton, forty-three $\frac{77}{100}$ dollars, it being the first above-named premium.

JNO. G. YEISER, *Dist. Agent.*

75 CONDITIONS.

I. Policies expire at noon on the last day of the period for which payment has been made.

II. If a change takes place in the name or residence of the insured, notice of such change must be given to the company.

III. Agents are not authorized to make contracts for the company, nor to write upon the policy, (except his signature when necessary to the first receipt of premium; see condition No. 5,) nor to waive forfeiture of the same.

IV. In case of the assignment of a policy, (whether as security or otherwise,) satisfactory proofs of the amount of the assignees' interest in the insured life must be furnished with the proofs of death.

V. Receipts for premiums, excepting the first, (to be found on the face of this policy,) will invariably be given on a separate paper, and will not be valid without the seal of the company.

PROOFS OF LOSS REQUIRED.

1. A certificate of the physician who attended the insured in his last illness, stating particularly the nature of the disease, its duration, and the date and hour of decease; his apparent age, height, complexion, and general appearance.

76 2. Certificate of a friend or intimate acquaintance, stating the disease of which the party died, how long he was sick, a knowledge of such death and how obtained, and the time of death.

3. Certificate of sexton or undertaker who superintended the funeral of insured, and saw his remains interred; stating apparent age, height, complexion, and general appearance.

The said several certificates must be sworn or affirmed to before some magistrate or public officer empowered to administer an oath, accompanied by a certificate in conformity to the act of Congress of the authority of the officer who administers the oath.

THE NECESSARY RECEIPT ON THE PAYMENT OF THE POLICY.

When it is a policy on the life of a husband for the benefit of a wife, or the life of wife for the benefit of a husband, or of a party insuring the life of another, or in case of an assigned policy, a receipt on the policy from the party legally entitled to the payment is all that is required. But when a party insures his own life, in case of death the insurance must be collected by an executor or administrator legally author-

77 ized to settle the estate, and the official certificate of his appointment by the proper tribunal to that effect must be presented at

the office of the company with the policy duly receipted by said executor or administrator.

Acceptance of the premium due on this policy by the company or its agents, after the day upon which it is due, must be considered as acts of grace or courtesy, and in no wise to be construed as forming a precedent for future payments, or a waiver of the forfeiture of the policy according to the conditions therein expressed, if any future payment of premium be omitted on the day it falls due.

Agents of the company are in no case authorized to make, alter, or discharge contracts, or waive forfeiture.

Filed 1st March, 1872.

N. HODGE, *Clk*,
By B. F. EDWARDS, *D. C.*

February term, 1872, 17th day, 1st March, 1872.

ZENORA F. MAHONE AND W. C. D. MAHONE, her husband
vs.
THE AMERICAN LIFE INSURANCE COMPANY. } 4260.

78 Came the parties by their attorneys, and thereupon came a jury, to wit, J. M. Lowry, H. Caspar, G. B. Chapman, W. B. Lowry, W. P. Alston, Jim Smith, Louis Pittman, Jared Watts, Alexander McRea, A. H. Sivley, William Granberry, and Giles Williams, who, being duly elected, tried, and sworn the truth to speak upon the issue joined, and after a portion of the testimony in the cause on behalf of the plaintiffs had been offered to the jury, counsel for plaintiffs made application to the court to file a further replication to the fourth plea of said defendant in this cause, which was allowed him by the court, and thereupon the court allowed defendant's counsel until 9 o'clock to-morrow morning to reply over to said further replication of said plaintiffs, and thereupon, and by consent of counsel of the respective parties to this cause, the court permitted the jury in this cause to disperse until nine o'clock to-morrow morning.

Replication to 4th plea.

ZENORA F. MAHONE ET AL.
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79 And said plaintiffs, by leave of court first had and obtained, for further replication to defendant's fourth plea, say precludi non, because they say that, even though proof of the death of Leonidas Dillard was not made in strict conformity with the printed clauses under the head of "Proofs of loss required," printed on the back of said policy, yet that said defendant waived a strict compliance with said regulations by accepting the proofs as they were actually made by plaintiffs; and plaintiffs aver that they did make proof of the death of Leonidas Dillard to the satisfaction of said company or its authorized agent before the institution of this suit, and that said defendant, after receiving proofs of death of said Leonidas Dillard as aforesaid, made no objection thereto,

but on the contrary accepted the proof so made as satisfactory, and this they are ready to verify; wherefore they pray judgment, &c.

HARRIS AND WITHERS, *P. Q.*

Filed by leave of court 1st March, 1872.

N. HODGE, *Clk*,
By B. F. EDWARDS, *D. C.*

80 *Rejoinder to 2nd replication to 4th plea.*

In the circuit court for the second district of Hinds County, Mississippi.

ZENORA F. MAHONE ET AL.
vs. } No. 4260.
AMERICAN LIFE INSURANCE COMPANY.

And now, for rejoinder to the said second replication of said plaintiffs, to the said fourth plea of said defendants, heretofore pleaded in this cause, and which said second replication was filed in this cause on the first day on March, 1872, said defendants, by their attorneys, say that said defendants did not, as aver'ed in said second replication, waive a strict compliance with the conditions indorsed on the policy of insurance of the life of said Leonidas Dillard, as to the proofs of the death of said Leonidas Dillard; and that said plaintiffs never did make proofs of the death of said Leonidas Dillard to the satisfaction of said American Life Insurance Company in manner and form as stated in said second replication; nor did said insurance company ever accept, as satisfactory to them, any proofs of the death of said Leonidas Dillard, as so made to them by said plaintiffs.

81 All of which said defendants pray may be inquired of by a jury, &c.

B. J. SEMMES, AND
T. J. AND F. A. R. WHARTON,
Atto's for Defendant.

Filed by leave of court, March 2nd, 1872.

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

Plaintiffs' instructions.

ZENORA F. MAHONE ET AL
vs. }
AMERICAN LIFE INSURANCE COMPANY.

Instructions asked by plaintiffs' counsel.

1st. If the jury believe from the evidence that defendants issued the policy sued on, and received the premium thereon, and were not deceived or defrauded into the execution or issuance thereof by the false or fraudulent representations or concealments of *of* said Leonidas Dillard, and if they further believe from the evidence that said Leonidas Dillard died a natural death in November, 1870, and that satisfactory proof of his death was made to defendant as provided in said policy, or that the proof actually made was accepted as satisfactory by said defend-

82 ants, then they will find for plaintiffs.

Given.

N. HODGE, *Clk.*

2nd. If the jury find for plaintiffs, it is in their discretion to allow six per cent. interest on the amount of the policy, from sixty days after due notice and satisfactory proof of the death of said Dillard was made to said defendants to the date of their verdict.
Given.

N. HODGE, *Clk.*

3rd. If a life-insurance company issues a policy of insurance upon a greater risk than an ordinary one, with a full knowledge of all the facts, it cannot escape the binding obligation of its contract by pleading said facts.
Given.

N. HODGE, *Clk.*

4th. A full knowledge of the truth of the alleged mis-statements of Dillard in the application and proposals for insurance made by him, communicated to John G. Yeiser, the agent of said company at the time of said application and proposals, was a communication to the company, and notice to the agent within the scope of his authority is notice to the company he represents, and is binding on them.
Given.

N. HODGE, *Clk.*

83 5. The burden of proof is on defendants to show that there was any false or fraudulent statement or any concealment was made by said Dillard in his application and proposals for insurance.
Given.

N. HODGE, *Clk.*

6th. The defendants could waive the proofs of death required by the terms of the policy and accept any proof that may be satisfactory to them, and such waiver and acceptance may be evidenced by the express declarations of defend'ts, or by their act, word, or deed.
Given.

N. HODGE, *Clk.*

Filed 2nd March, 1872.

N. HODGE, *Clk,*
By B. F. EDWARDS, *D. C.*

Defendant's instructions.

In the circuit court for the second district of Hinds County, Mississippi.

ZONORA F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE COMPANY. } No. 4260.

Counsel for said defendants ask the court to instruct the jury as follows:

84 1st. The application of Leonidas Dillard for the insurance on his life, and the declaration of the said Dillard endorsed thereon, which were read as evidence to the jury, constitute a part of the contract between the parties upon which the policy of insurance sued on in this case was issued.
Given.

N. HODGE, *Clk.*

2nd. The law presumes that Leonidas Dillard understood the nature and character of the application made by him for insurance on his life, and on the faith and credit of which the policy of insurance sued on in this case was issued, at the time the same was signed and executed by him, and does not presume that any fraud was practiced on him to induce him to sign the same after his answers to the questions therein contained had been written down and carefully read to him; and that, consequently, said answers of said Dillard, as therein written, are conclusive on said Dillard and the plaintiffs in this case, unless the plaintiffs shall prove to the satisfaction of the jury that said Leonidas Dillard was induced to sign said application for such insurance by some fraudulent act or representation on the part of the defendants or some of
85 its agents. And this the plaintiff must prove to the entire satisfaction of the jury.

Given.

N. HODGE, *Clk.*

3rd. That if said Leonidas Dillard, in his said application for insurance on his life, in his answers to any of the questions therein propounded to him, made any false statements as to any material matter embraced in any such questions, or made any concealment as to any of such material matters, and that such false statement or concealment operated as an inducement with said defendants to issue the policy of insurance sued on in this case, and that such policy of insurance was so issued by said defendants upon the faith of said answers of said Leonidas Dillard, then the plaintiffs are not entitled to recover in this action, and, in such case, the jury ought to find their verdict for the defendants.

Given.

N. HODGE, *Clk.*

4th. It is immaterial whether or not the answers of said Leonidas Dillard to the questions propounded to him in his said application for an insurance on his life, as the same are therein written, were in the very language used by said Dillard, provided the jury shall be-
86 lieve from the evidence that after all of said answers were so written down the same were carefully read to and explained to said Dillard, as then so written down, and that he thereupon approved of said answers as so written down, and then signed his name to said application, unless the jury shall believe from the evidence so introduced before them that said Dillard was then so induced to sign his name by some fraudulent act or representation on the part of the defendants or some one of its agents.

Given.

N. HODGE, *Clk.*

5th. If the jury shall believe from the evidence that the answer of said Leonidas Dillard to the question number 5, in his said application for insurance on his life, of "yes," as written down in said application, was not in fact in the very words then used by said Dillard, but that the words then so used by him in reply to said question number 5 were either that he always takes his drinks, or that he never refuses to take his drinks, still, if the jury shall believe from the evidence before them that, after said answer "yes" had been so written down in said application for insurance, all of the answers to said questions, as

87 therein then written down, were carefully read over and explained to said Leonidas Dillard, before he signed said application, and that with a full knowledge of the fact that his answer to said question number 5 had been written down as "yes," said Dillard then signed said application, he thereby ratified and confirmed said application as fully as if he had at first given only the answer "yes" to said 5th question.

Given.

N. HODGE, *Clk.*

6. Unless the plaintiffs have proved to the entire satisfaction of the jury that they furnished to the defendants such proof of the death of Leonidas Dillard as is provided for in the conditions on the back of the policy of insurance which issued in this case, or that the defendants waived such proofs, then the plaintiffs are not entitled to recover in this action, and the jury should find their verdict for the defendants.

Given.

N. HODGE, *Clk.*

7. The jury are only authorized to give such weight to the testimony of an interested witness as, in view of his interest and the other evidence in the cause, they may believe it is fairly entitled to.

Given.

N. HODGE, *Clk.*

Filed 2nd March, 1872.

N. HODGE, *Clk.*,
By B. F. EDWARDS, *D. C.*

88 February term, 1872, 18th day, 2nd March, 1872.

ZENORA F. MAHONE AND W. C. D. MAHONE, her husband,
vs.
THE AMERICAN LIFE INSURANCE COMPANY. } 4260.

Came again the parties, by their attorneys, and also the jury sworn on yesterday to try the issue in this cause according to their dispersion, and the evidence and arguments of counsel being concluded, the jury, under sundry instructions given by the court, retired to consider of their verdict, and after a due consideration thereof returned into court, and upon their oath do say they find for the plaintiffs, and assess their damages at five thousand three hundred and fifty-two dollars and fifty cents; and thereupon the plaintiffs, by attorney, enter a remititur of *of* twenty-seven dollars and fifty cents.

Defendant's motion for a new trial.

In the circuit court for the second district of Hinds *Company*, Mississippi.

ZENORA F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE COMPANY. } 4260.

The defendants, by their attorneys, move the court to set aside

89 the verdict of the jury in this cause, and grant a new trial of this cause, for the following reasons:

1st. The verdict is contrary to the evidence in the cause.

2nd. Said verdict is contrary to the instructions given by the court to the jury.

3rd. The court erred in giving instructions to the jury on behalf of the plaintiffs.

4th. The court erred in admitting evidence to the jury on behalf of the plaintiffs.

5th. The court erred in excluding from the jury testimony offered on the part of the defendants.

B. J. SEMMES AND
T. J. AND F. A. R. WHARTON,
Atto's for Defendants.

Filed 2nd March, 1872.

N. HODGE, *Clk*,
By B. F. EDWARDS, *D. C.*

February term, 1872, 18th day, 2nd March, 1872.

ZENORA F. MAHONE ET AL.
vs.
THE AMERICAN LIFE INSURANCE CO. } 4260.

The motion of the defendants for a continuance of their motion for a new trial of this cause coming on to be heard by the court, and the court not having sufficient time before the expiration of the present
90 term of this court, which expires in twenty minutes, to hear said motion, it is thereupon ordered by the court that said motion for a new trial be continued until the next term of this court.

Witness-certificates issued at February term, 1872.

Circuit court, Febr'y term, 1872, second district.

THE STATE OF MISSISSIPPI, *Hinds County:*

Z. F. MAHONE ET ALS.
vs.
AM. LIFE INS. CO. } 4260.

I certify that Jno. T. Cox has proved his attendance as a witness on behalf of pl'ff 5 days, and traveled 24 miles, to and from, at this term of the court, for which he is entitled to eight dollars and 70 cents.

N. HODGE, *Clk.*

Circuit court, Feb'ry term, 1872, second district.

THE STATE OF MISSISSIPPI, *Hinds County:*

Z. F. MAHONE ET AL.
vs.
AM. LIFE INS. CO. } 4260.

I certify that W. T. Mahone has proved his attendance as a witness

in behalf of the pl'ff 5 days, and traveled 24 miles, to and from, at this term of the court, for which he is entitled to eight dollars and 70 cents.

N. HODGE, *Clerk.*

Circuit court, Febr'y term, 1872, second district.

THE STATE OF MISSISSIPPI, *Hinds County:*

Z. F. MAHONE ET AL. *vs.* AM. LIFE INS. CO. } 4260.

I certify that W. H. Nesmith has proved his attendance as a witness in behalf of the pl'ff 5 days, and traveled 24 miles, to and from, at this term of the court, for which he is entitled to eight dollars and 70 cents.

N. HODGE, *Clerk.*

Circuit court, Febr'y term, 1872, second district.

THE STATE OF MISSISSIPPI, *Hinds County:*

Z. F. MAHONE ET AL. *vs.* AM. LIFE INS. CO. } 4260.

I certify that W. B. Stewart has proved his attendance as a witness in behalf of pl'ff 5 days, and traveled 24 miles, to and from, at this term of the court, for which he is entitled to eight dollars and 70 cents.

N. HODGE, *Clerk.*

Circuit court, Febr'y term, 1872, second district.

THE STATE OF MISSISSIPPI, *Hinds County:*

Z. F. MAHONE ET AL. *vs.* AM. LIFE INS. CO. } 4260.

I certify that Eli McMullen has proved his attendance as a witness in behalf of the pl'ff 5 days, and traveled 24 miles, to and from,
92 at this term of the court, for which he is entitled to eight dollars and 70 cents.

N. HODGE, *Clerk.*

Circuit court, Febr'y term, 1872, second district.

THE STATE OF MISSISSIPPI, *Hinds County:*

Z. F. MAHONE ET AL. *vs.* AM. LIFE INS. CO. } 4260.

I certify that W. L. Roberts has proved his attendance as a witness in behalf of the pl'ff 4 days, and traveled 17 miles, to and from, at this term of the court, for which he is entitled to six dollars and 85 cents.

N. HODGE, *Clerk.*

Circuit court, Febr'y term, 1872, second district.

THE STATE OF MISSISSIPPI, *Hinds County:*

Z. F. MAHONE ET AL.
vs.
AM. LIFE INS. CO. } 4260.

I certify that A. A. Roberts has proved his attendance as a witness in behalf of pl'ff 5 days, and traveled 24 miles, to and from, at this term of the court, for which he is entitled to eight dollars and 70 cents.

N. HODGE, *Clerk.*

Circuit court, Febr'y term, 1872, second district.

THE STATE OF MISSISSIPPI, *Hinds County:*

Z. F. MAHONE ET EL.
vs.
AM. LIFE INS. CO. } 4260.

93 I certify that James Geary has proved his attendance as a witness in behalf of the pl'ff 2 days, and traveled 30 miles, to and from, at this term of the court, for which he is entitled to four dollars and 50 cents.

N. HODGE, *Clerk,*
By B. F. EDWARDS, *D. C.*

Circuit court, Febr'y term, 1872, second district.

THE STATE OF MISSISSIPPI, *Hinds County:*

Z. F. MAHONE ET AL.
vs.
AM. LIFE INS. CO. } 4260.

I certify that Henry Smothers has proved his attendance as a witness in behalf of pl'ff 5 days, and traveled 24 miles, to and from, at this term of the court, for which he is entitled to eight dollars and 70 cents.

N. HODGE, *Clerk,*
By B. F. EDWARDS, *D. C.*

Circuit court, Febr'y term, 1872, second district.

THE STATE OF MISSISSIPPI, *Hinds County:*

Z. F. MAHONE ET AL.
vs.
AM. LIFE INS. CO. } 4260.

I certify that Lou Marshall has proved her attendance as a witness in behalf of the pl'ff 5 days, and traveled 24 miles, to and from, at this term of the court, for which she is entitled to eight dollars and 70 cents.

N. HODGE, *Clerk,*
By B. F. EDWARDS, *D. C.*

94 Circuit court, Febr'y term, 1872, second district.

THE STATE OF MISSISSIPPI, *Hinds County:*

Z. F. MAHONE ET AL.
vs. } 4260.
AM. LIFE INS. CO.

I certify that Wash Black has proved his attendance as a witness in behalf of the pl'ff 5 days, and traveled 24 miles, to and from, at this term of the court, for which he is entitled to eight dollars and 70 cents.

N. HODGE, *Clerk.*

Circuit court, Febr'y term, 1872, second district.

THE STATE OF MISSISSIPPI, *Hinds County:*

Z. F. MAHONE ET AL.
vs. } 4260.
AM. LIFE INS. CO.

I certify that Jane Bright has proved her attendance as a witness in behalf of the pl'ff 5 days, and traveled 24 miles, to and from, at this term of the court, for which she is entitled to eight dollars and 70 cents.

N. HODGE, *Clerk.*

Circuit court, Febr'y term, 1872, second district.

THE STATE OF MISSISSIPPI, *Hinds County:*

Z. F. MAHONE ET AL.
vs. } 4260.
AM. LIFE INS. CO.

I certify that Minda Brown has proved her attendance as a witness
in behalf of the pl'ff 5 days, and traveled 24 miles, to and from,
95 at this term of the court, for which she is entitled to eight dollars and 70 cents.

N. HODGE, *Clerk.*

Circuit court, Febr'y term, 1872, second district.

THE STATE OF MISSISSIPPI, *Hinds County:*

Z. F. MAHONE ET AL.
vs. } 4260.
AM. LIFE INS. CO.

I certify that Wash. Robinson has proved his attendance as a witness in behalf of pl'ff 5 days, and traveled 24 miles, to and from, at this term of the court, for which he is entitled to eight dollars and 70 cents.

N. HODGE, *Clerk,*
By B. F. EDWARDS, *D. C.*

Circuit court, Febr'y term, 1872, second district.

THE STATE OF MISSISSIPPI, *Hinds County:*

Z. F. MAHONE ET AL.
vs.
AM. LIFE INS. CO. } 4260.

I certify that Nat. McGowen has proved his attendance as a witness in behalf of the def't 4 days, and traveled 24 miles, to and from, at this term of the court, for which he is entitled to seven dollars and 20 cents.

N. HODGE, *Clerk.*

Circuit court, Febr'y term, 1872, second district.

THE STATE OF MISSISSIPPI, *Hinds County:*

Z. F. MAHONE ET AL.
vs.
AM. LIFE INS. CO. } 4260.

96 I certify that A. P. Harris has proved his attendance as a witness in behalf of the def't 4 days, and traveled 24 miles, to and from, at this term of the court, for which he is entitled to seven dollars and 20 cents.

N. HODGE, *Clerk.*

THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court, Febr'y term, 1872, second district.

Z. F. MAHONE ET AL.
vs.
AM. LIFE INS. CO. } 4260.

I certify that B. F. Downing has proved his attendance as a witness in behalf of def't 5 days, and traveled 24 miles to and from, at this term of the court, for which he is entitled to eight dollars and 70 cents.

N. HODGE, *Clerk.*

THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court, Febr'y term, 1872, second district.

Z. F. MAHONE ET AL.
vs.
AM. LIFE INS. CO. } 4260.

I certify that J. Alexander has proved his attendance as a witness in behalf of the def't 5 days, and traveled 16 miles to and from, at this term of the court, for which he is entitled to eight dollars and 30 cents.

N. HODGE, *Clerk.*

97 THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court, Febr'y term, 1872, second district.

Z. F. MAHONE ET AL.
vs. } 4260.
AM. LIFE INS. CO.

I certify that W. B. Williamson has proved his attendance as a witness in behalf of the def't 3 days, and traveled 24 miles to and from, at this term of the court, for which he is entitled to five dollars and 70 cents.

N. HODGE, *Clerk.*

THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court, Febr'y term, 1872, second district.

Z. F. MAHONE ET AL.
vs. } 4260.
AM. LIFE INS. CO.

I certify that J. H. Frieze has proved his attendance as a witness in behalf of the def't 4 days, and traveled 24 miles to and from, at this term of the court, for which he is entitled to seven dollars and 30 cents.

N. HODGE, *Clerk.*

THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court, Febr'y term, 1872, second district.

Z. F. MAHONE ET AL.
vs. } 4260.
AM. LIFE INS. CO.

I certify that M. McLinon has proved his attendance as a witness in behalf of the def't 5 days, and traveled 24 miles to and from,
98 at this term of the court, for which he is entitled to eight dollars and 70 cents.

N. HODGE, *Clerk.*

THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court, Febr'y term, 1872, second district.

Z. F. MAHONE ET AL.
vs. } 4260.
AM. LIFE INS. CO.

I hereby certify that W. O. Harrison has proved his attendance as a witness in behalf of the def't 4 days, and traveled 24 miles to and from, at this term of the court, for which he is entitled to seven dollars and 20 cents.

N. HODGE, *Clerk.*

Subpœnas to June term, 1872.

The State of Mississippi to the sheriff of Hinds County, greeting:

We command you to summon W. W. Nesmith, Dan'l Lynch, W. B. Stewart, A. McPike, Eli McMullen, and T. D. Hudspeth to be and personally appear before the judge of our circuit court of the second district of Hinds County, at a court to be holden at the court-house thereof, in the town of Raymond, on the 2nd Monday of June, 1872, on the 3rd day of the term, being the 12th day of June, 1872, to give evi-
99 dence in a certain cause in said court pending, wherein Z. F. Mahone et al. are plaintiffs and The American Life Insurance Company are defendants, on the part of the pl'ffs. Herein they shall not fail under the penalty in such cases made and provided; and have then and there this writ.

Witness my hand this the 3rd day of June, 1872.

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

Rec'd 3rd June, 1872.

J. M. COATS, *Sh'ff.*

Executed this s'p'a on W. W. Nesmith, Eli McMullen, T. D. Hudspeth, in person, by handing to each of them a true copy thereof, June 5th, 1872.

J. M. COATS, *Sh'ff*,
By J. C. FAIRCHILD, *D. S.*

Executed this s'p'a this day on W. B. Stewart and A. McPike, in person, by handing to each of them a true copy thereof, June 6th, 1872.

J. M. COATS, *Sh'ff*,
By J. C. FAIRCHILD, *D. C.*

Daniel Lynch cannot be found in my county after diligent search for him, June 8, 1872.

J. M. COATS, *Sh'ff*,
By J. B. FAIRCHILD, *D. S.*

100 The State of Mississippi to the sheriff of Hinds County, greeting:

We command you to summon John G. Yeiser, A. L. Yeiser, John T. Cox, W. T. Mahone, Dr. A. P. Harris, and M. McLinon to be and personally appear before the judge of our circuit court of the second district of Hinds County, at a court to be holden at the court-house thereof, in the town of Raymond, on the 2nd Monday of June, 1872, on the 3rd day of the term, being the 12th day of June, 1872, to give evidence in a certain case in said court pending, wherein Z. F. Mahone et al. are plaintiffs and The American Life Insurance Company are defendants, on the part of pl'ffs. Herein they shall not fail under the penalty in such cases made and provided; and have then and there this writ.

Witness my hand this the 3rd day of June, 1872.

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

Rec'd 3rd June, 1872.

J. M. COATS, *Sh'ff.*

Executed this s'p'a on A. L. Yeiser, John T. Cox, Dr. A. P. Harris, M. McLinon, in person, by handing to each of them a true copy thereof, June 5, 1872.

J. M. COATS, *Sh'ff*,
By J. C. FAIRCHILD. *D. S.*

101 Executed this day this s'p'a on W. S. Mahone, by leaving with his wife, who was sixteen years ot age, and who was at his usual place of abode, she being then and there willing to receive the same, a true copy thereof, he not being found in my county after search for him.

June 5th, 1872.

J. M. COATS, *Sh'ff*,
By J. C. FAIRCHILD, *D. S.*

Executed this s'p'a on J. G. Yeiser, by leaving with A. L. Yeiser, who was sixteen years of age, and who was at his usual place of abode, he being then and there willing to receive the same, a true copy thereof, he not being found in my county after search for him.

June 5th, 1872.

J. M. COATS, *Sh'ff*,
By J. C. FAIRCHILD, *D. S.*

The State of Mississippi to the sheriff of Hinds County, greeting:

We command you to summon He'ry Smothers, James Marshall, Dennis McCall, Louisa Marshall, Wash. Black, and Jane Brown, to be and personally appear before the judge of our circuit court of the second district of Hinds County, at a court to be holden at the court-house thereof, in the town of Raymond, on the 2nd Monday of June,
102 1872, to give evidence in a certain cause in said court pending, wherein Z. T. Mahone et al. are plaintiffs and The American Life Insurance Company are defendants, on the part of p'ffs. Herein they shall not fail under the penalty in such cases made and provided; and have then and there this writ.

Witness my hand this the 3rd day of June, 1872.

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

Rec'd 3rd June, 1872.

J. M. COATS, *Sh'ff.*

Executed this s'p'a this day, on Henry Smothers, James Marshall, Dennis McCall, Louisa Marshall, and Jane Brown, in person, by handing to each of them a true copy thereof.

June 5, 1872.

J. M. COATS, *Sh'ff*,
By J. C. FAIRCHILD, *D. S.*

Wash. Black cannot be found in my county after diligent search for him.

June 5th, 1872.

J. M. COATS, *Sh'ff*,
By J. C. FAIRCHILD, *D. S.*

The State of Mississippi to the sheriff of Hinds County, greeting:

We command you to summon Capt. Pittman, W. L. Roberts,
103 A. A. Roberts, Dr. J. Alexander, A. G. Mott, and B. F. Downing,

to be and personally appear before the judge of our circuit court of the second district of Hinds County, at a court to be holden at the court-house thereof, in the town of Raymond, on the 2nd Monday of June, 1872, on the 3rd day of the term, being the 12th day of June, 1872, to give evidence in a certain cause in said court pending, wherein Z. F. Mahone et al. are plaintiffs and The American Life Insurance Company are defendants, on the part of pl'ff. Herein they shall not fail under the penalty in such cases made and provided; and have then and there this writ.

Witness my hand this the 3rd day of June, 1872.

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

Rec'd 3rd June, 1872.

J. M. COATS, *Sh'ff.*

Executed this process this day on Capt. Pittman, in person, by handing him a true copy thereof.

June 5th, 1872.

J. M. COATS, *Sh'ff*,
By F. W. FAIRCHILD, *D. S.*

Executed this process this day on W. L. Roberts, A. A. Roberts, and F. B. Downing, in person, by handing to each of them a true copy thereof.

June 6th, 1872.

J. M. COATS, *Sh'ff*,
By F. W. FAIRCHILD, *D. S.*

104 Executed this s'p'a on D'r J. Alexander, in person, by handing him a true copy thereof.

June 3rd, 1872.

J. M. COATS, *Sh'ff*,
By J. C. FAIRCHILD, *D. S.*

A. G. Mott cannot be found in my county after diligent search for him.

June 10th, 1872.

J. M. COATS, *Sh'ff*,
By J. B. FAIRCHILD, *D. S.*

The State of Mississippi to the sheriff of Hinds County, greeting:

We command you to summon S. S. Whitehead, sr., S. S. Whitehead, jr., John Whitehead, W. C. D. Mahone, and James Gary, to be and personally appear before the judge of our circuit court of the second district of Hinds County, at a court to be holden at the court-house thereof, in the town of Raymond, on the 2nd Monday of June, 1872, on the 3rd day of the term, being the 12th day of June, 1872, to give evidence in a certain case in said court pending, wherein Z. F. Mahone et al. are plaintiffs and The American Life Insurance Company are defendants, on the part of pl'ffs. Herein they shall not fail under the penalty in
105 such cases made and provided; and have then and there this writ.

Witness my hand this the 3rd day of June, 1872.

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

Rec'd 3rd June, 1872.

J. M. COATS, *Sh'ff.*

Executed this process this day on S. S. Whitehead, jr., S. S. Whitehead, sr., John Whitehead, W. C. D. Mahone, in person, by handing to each of them a true copy thereof.
June 7th, 1872.

J. M. COATS, *Sh'ff*,
By F. W. FAIRCHILD, *D. S.*

Executed this process this day on James Garey, by leaving a copy thereof in the M. Williams for him, at his usual place of abode.
June 7th, 1872.

J. M. COATS, *Sh'ff*,
By F. W. FAIRCHILD, *D. S.*

The State of Mississippi to the sheriff of Hinds County, greeting:

We command you to summon Jane Bright, Minda Brown, and Oscar Carter, to be and personally appear before the judge of our circuit court of the second district of Hinds County, at a court to be holden at the court-house thereof, in the town of Raymond, on the 2nd Monday of June, 1872, on the 3rd day of the term, being the 12th day of
106 June, 1872, to give evidence in a certain case in said court pending, wherein Z. F. Mahone et al. are plaintiffs and The American Life Insurance Company are defendants, on the part of pl'ffs. Herein they shall not fail under the penalty in such case made and provided; and have then and there this writ.
Witness my hand this the 3rd day of June, 1872.

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

Rec'd 3rd June, 1872.

J. M. COATS, *Sh'ff.*

Executed this day this s'p'a on Jane Bright and Minda Brown, in person, by handing to each of them a true copy hereof.
June 5th, 1872.

J. M. COATS, *Sh'ff*,
By J. C. FAIRCHILD, *D. S.*

Executed this s'p'a on Oscar Carter, by leaving with his wife, who was sixteen years of age, and who was at his usual place of abode, she being then and there willing to receive the same, a true copy thereof, he not being found in my county.
June 5th, 1872.

J. M. COATS, *Sh'ff*,
By J. C. FAIRCHILD, *D. S.*

107 The State of Mississippi to the sheriff of Warren County, greeting:

We command you to summon Winan Leonard and Hamilton Wright, to be and apersonally appear before the judge of our circuit court of the second district of Hinds County, at a court to be holden at the court-house thereof, in the town of Raymond, on the 2nd Monday of June, 1872, on the 3rd day of the term, being the 12th day of June, 1872, to give evidence in a certain case in said court pending, wherein Z. F. Mahone et al. are plaintiffs and The American Life Insurance Company are defendants, on the part of pl'ffs. Herein they shall not fail under the

penalty in such case made and provided; and have then and there this writ.

Witness my hand this the 3rd day of June, 1872.

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

Recived this 5th day of June, A. D. 1872.

CHA'S E. FURLONG, *Sh'ff.*

The within-named Wyman Leonard and Hamilton Wright not found in my county this 8th day of June, A. D. 1872.

CHA'S E. FURLONG, *Sh'ff.*

108 *Affidavit for security for costs.*

In the circuit court for the second district of Hinds County Mississippi.

ZENORA F. MAHONE AND W. C. D. MAHONE, her husband,
vs.
THE AMERICAN LIFE INSURANCE CO. } 4260.

Personally came before me, Murray Peyton, clerk of the chancery court in and for said county, Benjamin F. Edwards, deputy clerk for N. Hodge, clerk of the circuit court of said Hinds County, who, after being duly sworn, upon his oath says that he has reason to believe, and does believe, that the plaintiffs in this cause will not be able to pay the cost of suit in case the same shall be adjudged against them.

Sworn to and subscribed before me at office in Raymond, this 5th day of June, A. D. 1872.

MURRAY PEYTON, *Ch'y Clk.*

B. F. EDWARDS, *Deputy Clerk.*

Filed 5 June, 1872.

N. HODGE, *Clk.*
By B. F. EDWARDS, *D. C.*

Motion.

In the circuit court for the second district of Hinds County, Mississippi.

ZENORA F. MAHONE AND W. C. D. MAHONE, her husband,
vs.
THE AMERICAN LIFE INSURANCE CO. } 4260.

109 N. Hodge, clerk of the circuit court of Hinds County, moves the court to require the plaintiffs to give good and sufficient security for all the costs of this suit which have or may hereafter accrue therein for the reason stated in his affidavit filed in this cause.

N. HODGE, *Clk,*
By B. F. EDWARDS, *D. Clk.*

Filed 5 June, 1872, and entered same day.

N. HODGE, *Clk,*
By B. F. EDWARDS, *D. C.*

The State of Mississippi to the sheriff of Hinds County, greeting:

We command you to summon M. Hoddson, A. J. Word, E. Matthews, John G. Sparrow, and C. W. Barber to be and personally appear before the judge of our circuit court of the second district of Hinds County, at a court to be held at the court-house thereof, in the town of Raymond, on the 2nd Monday of June, 1872, on the 3rd day of the term, being the 12th day of June, 1872, to give evidence in a certain case in said court pending, wherein, Z. F. Mahone et al. are plaintiffs and The American Life Insurance Company are defendants, on the part of the de-
110 fendants. Herein they shall not fail under the penalty in such case made and provided; and have then and there this writ.

Witness my hand this the 7th day of June, 1872.

N. HODGE, *Clerk.*

Rec'd 7th June, 1872.

J. M. COATS, *Sh'ff.*

Executed this s'p'a this day on M. Hoddson, A. J. Word, E. Manthews, John G. Sparrow, and C. W. Barber, by handing to them a true copy of the s'p'a, June 10th, 1872.

J. M. COATS, *Sh'ff,*
By W. P. ALSTON, *D. S.*

June Term, 1872, 1st day, 10th June, 1872.

ZENORA F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE COMPANY. } 4260.

The motion of the defendants to set aside the verdict of the jury, and for a grant of a new trial of this cause *and* continued at the last term of the court, having been argued by counsel for the respective parties, now duly considered by the court, it is now ordered and adjudged by the court that said motion be sustained, that said verdict of the jury be set aside, and that a new trial of said cause is hereby granted.

111 *Subpœnas to June term.*

The State of Mississippi to the sheriff of Hinds County, greeting:

We command you to summon Nat. McGowan, Patrick Bradley, Z. T. Pittman, John Dillard, Dr. A. P. Harris and Benjamin T. Downing to be and personally appear before the judge of our circuit court of the second district of Hinds County, at a court which began at the court-house thereof, in the town of Raymond, on the 2nd Monday of June, 1872, on the 3rd day of the term, being the 12th day of June, 1872, to give evidence in a certain case in said court pending, wherein Z. F. Mahone et al. are plaintiffs and American Life Insurance Company are defendants, on the part of defendants. Herein they shall not fail under the penalty in such case made and provided; and have then and there this writ.

Witness my hand this the 10th day of June, 1872.

N. HODGE, *Clerk.*

Rec'd 10th June, 1872.

J. M. COATS, *Sh'ff.*

Executed on Nat. McGowan, Dr. A. P. Harris, and B. T. Downing, 11th June, 1872.

J. M. COATS, *Sh'ff*,
By L. M. SMITH, *D. S.*

112 Neither Bradley, Z. T. Pittman, nor John Dillard can be found in my county after diligent search in my county for them, June 11th, 1872.

J. M. COATS, *Sh'ff.*
By L. M. SMITH, *D. S.*

The State of Mississippi to the sheriff of Hinds County, greeting:

We command you to summon Dr. John Alexander, Dr. W. B. Williamson, J. H. Frieze, W. McLinon, W. O. Harrison, and John G. Yeiser to be and personally appear before the judge of our circuit court of the second district of Hinds County, at a court which began at the court-house thereof, in the town of Raymond, on the 2nd Monday of June, 1872, or the 3rd day of the term, being the 12th day of June, 1372, to give evidence in a certain case in said court pending, wherein Z. F. Mahone et al. are plaintiffs and American Life Insurance Company are defendants, on the part of the defendant. Herein they shall not fail under the penalty in such case made and provided; and have then and there this writ.

113 Witness my hand this 10th day of June, 1872.

N. HODGE, *Clerk.*

Rec'd 10th June, 1872.

J. M. COATS, *Sh'ff.*

Executed this s'p'a 10th June, 1872, in person, on Dr. J. Alexander. June 10th, 187 .

J. M. COATS, *Sh'ff*,
By J. B. FAIRCHILD, *D. S.*

Executed this s'p'a on W'm B. Williamson, on the 10th, and on W'm McLinon, W. O. Harrison, in person, 11th June, 1872.

J. M. COATS, *Sh'ff.*
By L. H. SMITH, *D. S.*

Executed this s'p'a on J. G. Yeiser, by leaving for him at his usual place of abode, with his mother, Mrs. Eliza M. Yeiser, of 16 years of age, and who was willing then and there to receive the same, a true copy thereof, 11th June, 1872.

J. M. COATS, *Sh'ff*,
By L. M. SMITH, *D. S.*

J. M. Frieze cannot be found in my county.
June 11th, 1872.

J. M. COATS, *Sh'ff*,
By L. M. SMITH, *D. S.*

The State of Mississippi to the sheriff of Hinds County, greeting:

We command you to summon A. G. Mott to be and personally
114 appear before the judge of our circuit court of the second district of Hinds County, at a court which began at the court-

house thereof, in the town of Raymond, on the 2nd Monday of June, 1872, on the 3rd day of the term, being the 12th day of June, 1872, to give evidence in a certain case in said court pending, wherein Z. F. Mahone et al. are plaintiffs and American Life Insurance Company are defendants, on the part of defendants. Herein he shall fail not under the penalty in such case made and provided; and have then and there this writ.

Witness my hand this 10th day of June, 1872.

N. HODGE, *Clerk.*

Rec'd 10th June, 1872.

J. M. COATS, *Sh'ff.*

Executed this s'p'a on A. G. Mott, 11th June, 1872.

J. M. COATS, *Sh'ff,*
By L. M. SMITH, *D. S.*

Z. F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE COMPANY. } 4260. To June term, 1872.

The defendants, by their attorneys, ask leave to file an additional plea in this cause for the reasons stated in said plea.

115

B. J. SEMMES AND
T. J. AND F. A. R. WHARTON,
Atto's for Motion.

HARRIS AND WITHERS, *Contra.*

Entered June 10, '72.

N. HODGE, *Clerk.*

June term, 1872, 3rd day, 12 June, 1872.

Z. F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE CO. } 4260.

The motion of the clerk to require the plaintiffs to give security for the costs of this cause being duly considered by the court, is sustained; and thereupon said plaintiffs tendered W. L. Roberts as such security, who, upon due examination under oath in open court, was accepted, and thereupon immediately entered into bond for costs in this behalf in the penalty of five hundred dollars.

THE STATE OF MISSISSIPPI, *Hinds County:*

Court 2nd dist. To June term, 1872.

ZENORA F. MAHONE ET AL.
vs.
THE AMERICAN LIFE INSURANCE COMPANY. } No. 4260.

116 I hereby acknowledge myself as security for the payment of all costs which have accrued, or which may hereafter accrue, in the above-stated cause, to the amount of five hundred dollars.

Given under my hand and seal this the 12th day of June, 1872.

W. C. D. MAHONE. [SEAL.]
W. L. ROBERTS. [SEAL.]

Approved.

N. HODGE, *Clk*,
By B. F. EDWARDS, *D. C.*

Filed and approved 12th June, 1872.

N. HODGE, *Clk*,
By B. F. EDWARDS, *D. C.*

The State of Mississippi to the sheriff of Hinds County, greeting:

We command you to summon Hubbard Strange, Wash. Robinson, Willis Jones, Joshua Stone, to be and personally appear before the judge of our circuit court of the second district of Hinds County, at a court which began at the court-house thereof, in the town of Raymond, on the 2nd Monday of June, 1872, on the 4th day of the term, being the 13th day of June, 1872, to give evidence in a certain case
117 *case* in said court pending, wherein Zenora F. Mahone is plaintiff and American Life Ins. Co. defendant, on the part of pl'ff. Herein they shall not fail under the penalty in such case made and provided; and have then and there this writ.

Witness my hand this 13th day of June, 1872.

N. HODGE, *Clerk.*

Rec'd 13th June, 1872.

J. M. COATS, *Sh'ff.*

Executed this s'p'a on Hubbard Strange and Wash. Robinson, 13th June, 1872.

J. M. COATS, *Sh'ff*,
By J. C. FAIRCHILD, *D. S.*

Executed this s'p'a on Joshua Stone in person, June 12, 1872.

J. M. COATS, *Sh'ff*,
By J. C. FAIRCHILD, *D. S.*

Willis Jones cannot be found in my county.
June 13, 1872.

J. M. COATS, *Sh'ff*,
By J. C. FAIRCHILD, *D. S.*

June term, 1872, 4th day, 13th June, 1872.

ZENORA F. MAHONE ET AL.
vs. } 4260.
AMERICAN LIFE INS. COMPANY.

On motion of defendants it is ordered by the court that said defendants have leave to file an additional plea in this cause, and that said plaintiff' have ten days within which to file their replication thereto,
118 which, if filed within said time, to be taken as filed of this date.

5th plea of defendants.

In the circuit court of Hinds County, Mississippi, for the second district thereof, at the June term, 1872.

ZENORA F. MAHONE AND W. C. D. MAHONE
vs.
THE AMERICAN LIFE INSURANCE COMPANY. } 5th plea. No. 4260.

And now, at the term aforesaid of the court aforesaid, and by leave of said court for a further plea in this behalf, said defendants, by attorneys, say that said plaintiffs ought not to have and maintain their aforesaid action hereof against the said defendants, because the said defendants say that the said policy of insurance on the life of the said Leonidas Dillard which is set forth in the said declaration hereof of said plaintiffs against the said defendants was void and of no effect at the time the same was executed and issued by said defendant, because the same was so executed and issued by said defendants under and by reason of certain false and fraudulent representations made to said defend-
119 ants by the said Leonidas Dillard in his proposals to said defendant for the execution and issuance by said defendants of said policy of insurance, which said proposals are refer'd to in said policy of insurance as bearing date the 30th day of August, 1870, as "upon the full faith of which this policy is issued," and a copy of which said proposals has been heretofore filed by said defendants as part of the first and plea by said defendants heretofore pleaded in this case, and which said copy of said policy of insurance is now here, and again refer'ed to specially as part of this plea, and as an exhibit thereto, in this, to wit: that, to question No. 15 in said proposals, which is in these words, to wit: "Has a proposal been made for insuring the life"—intending thereby to refer to the life of the said Leonidas Dillard—"in this or any other office," intending thereby to refer to any other life-insurance company; and, if so, whether accepted or declined? If insured, state in what company and for what amount;" said Leonidas Dillard answered as follows, to wit: "Insured in Equitable $5,000," thereby intending to induce said defendants to believe, and which did so induce said defendants to believe, that the life of said
120 Leonidas Dillard was at the time of said answer insured in the Equitable Life Assurance Society of New York at and for the sum of five thousand dollars. And said defendant avers that, at the time of making said answer, the life of said Leonidas Dillard was not insured by said Equitable Life Assurance Society of New York for any amount of money whatever, and that the said answer of said Leonidas Dillard, herein last refer'ed to, was false and fraudulent, and was so made by him for the purpose of imposing upon and deceiving said defendants, and to induce said defendants to execute and issue said policy of insurance on his life.

Wherefore said defendants say that, by reason of said false and fraudulent answer hereinbefore refer'ed to, so made by said Leonidas Dillard, they were imposed upon and deceived into the execution and issuance of said policy of insurance on the life of said Leonidas Dillard, and that, by reason of said false and fraudulent answer, said policy of insurance on the life of said Leonidas Dillard is void and of no effect: all

121 of which said defendants are ready to verify. Wherefore they pray judgment, &c.

B. J. SEMMES AND
T. J. AND F. A. R. WHARTON,
Attorneys for Defendants.

Filed, under leave of court, June 13th, 1872.

N. HODGE, *Clerk.*

Def't's motion for removal of cause to U. S. court.

In the circuit court of Hinds County, Mississippi, for the second district thereof.

ZENORA F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE COMPANY. } No. 4260.

The defendants, by their attorneys, move the court for a removal or transfer of said cause for all other further and final proceedings and trial into the circuit court of the United States for the southern district of the State of Mississippi, for the reasons stated in their written petition, this day filed in said circuit court for the second district of said Hind' County, &c.

B. J. SEMMES AND
T. J. AND F. A. R. WHARTON,
Atto's for Motion.

HARRIS and WITHERS and C. E. HOOKER, *Contra.*

Filed and entered June 14th, 1872.

N. HODGE, *Cl'k,*
By B. F. EDWARDS, *D. C.*

122 *Petition of Def'ts for removal of cause into U. S. court, &c.*

To the Hon'l. George F. Brown, judge of the fifteenth judicial district of the State of Mississippi.

The petition of the American Life Insurance Company respectfully represents unto your honor as follows:

That on the 12th day of June, 1871, one Zenora F. Mahone and W. C. D. Mahone, her husband, instituted their certain suit against said American Life Insurance Company in the circuit court for the second district of Hinds County, Mississippi, the same being in said fifteenth judicial district of the State of Mississippi; and that said suit is still pending in and undecided by said circuit court for the said second district of said Hinds County, and is number 4260 on the dockets of said court. That said suit is based upon a certain policy of insurance on the life of one Leonidas Dillard, issued, by said American Life Insurance Company, on the 30th day of August, 1870, in favor of said Zenora F. Mahone, for the sum of five thousand dollars, and that the amount
123 of money claimed or demanded in said suit is the sum of seven thousand and five dollars and interest thereon. That at the time of the institution of said suit, said Zenora F. Mahone and W. C. D. Mahone were citizens of the State of Mississippi, and yet are citizens of said State; and at the time of the institution of said suit, said American

obligation shall be null and void; otherwise to remain in full force and effect.

AMERICAN LIFE INS. COMPANY— [SEAL.]
By CHARLES HANDY, *Agent.*
THO'S A. PHILLIPS. [SEAL.]
A. N. PARKER. [SEAL.]

STATE OF MISSISSIPPI,
Madison County:

Personally appeared before me, David Pingree, clerk of the circuit court in and for said county and State, Tho's A. Phillips and A. N. Parker, who, being by me first duly sworn, depose and say that
130 the signatures attached are their true and genuine signatures; that they are each and separately worth the sum of one thousand dollars over and above all their just debts, obligations, and all exemptions allowed by law.

A. N. PARKER.
THO'S A. PHILLIPS.

Sworn to and subscribed before me this 11th day of June, A. D. 1872.
[SEAL.] DAVID PINGREE,
Circuit Clerk.

Filed with petition above referred to, June 14, 1872.
N. HODGE, *Clerk.*

June term, 1872, 5th day, 14th June, 1872.

ZENORA F. MAHONE AND W. C. D. MAHONE, her husband,
vs.
THE AMERICAN LIFE INSURANCE COMPANY. } 4260.

This cause coming on to be heard by this court, upon the petition or application of said defendants for a removal of this for all other, further, and final proceedings and trial, into the next term of the circuit court of the United States of America for the southern district of the State of Mississippi; and this court, having now examined said appli-
131 cation or petition, and having heard the arguments of the counsel of the respective parties to said application, and having now duly considered of the several matters involved in said application, and being now satisfied that said application or petition in all material respects and particulars conforms to the requirements of the acts of the Congress of the United States of America in such cases made and provided, and that the bond and securities thereto tendered by said defendants and filed as Exhibit A to said application or petition is ample and sufficient security for the purposes therein recited, does now order, adjudge, and decree as follows, to wit: 1st. That said bond be and the same is hereby accepted and approved by this court as a sufficient security for the purposes therein and thereby intended to be provided for. 2nd. That said cause be removed into the circuit court of the United States of America for the southern district of the State of Mississippi for all other, further, and final proceedings and trial therein; provided as follows, to wit: That said defend-
ants, The American Life Insurance Company, shall, on the first
132 day of the next November term of said circuit court of the United

States of America, enter therein, to wit, in said circuit court of the United States of America, copies of all process, pleadings, depositions, testimony, and other proceedings had and done in said cause in said court. 3rd. That upon compliance with the terms and specifications contained in the provision in the foregoing portion of this judgment, the bond herein before referred to as Exhibit A to said application or petition of said defendants do cease and become null and void; and that all other or further proceedings as between said Zenora F. Mahone and W. C. D. Mahone against said American Life Insurance Company in this cause in this court do cease and be determined.

Witness certificates issued at June term, 1872.

THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE CO. } No. 4260.

133 I certify that J. T. Cox hath proved his attendance as a witness on behalf of the pl'ffs 2 days, and traveled 24 miles to and from, at this term of court, for which he is entitled to four dollars and twenty c'ts.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE CO. } No. 4260.

I certify that W. T. Mahone hath proved his attendance as a witness on behalf of the pl'ff's 2 days, and traveled 24 miles to and from, at this term of the court, for which he is entitled to four dollars and twenty cents.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE CO. } No. 4260.

134 I certify that W. W. Nesmith hath proved his attendance as a witness on behalf of the pl'ff 2 days, and traveled 24 miles to and

from, at this term of court, for which he is entitled to four dollars and twenty c'ts.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL.
vs. } No. 4260.
AMERICAN LIFE INSURANCE CO.

I certify that Eli McMullen hath proved his attendance as a witness, on behalf of the pl'ffs 2 days, and traveled 20 miles to and from, at this term of court, for which he is entitled to four dollars and c'ts.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL.
vs. } No. 4260.
AMERICAN LIFE INSURANCE CO.

135 I certify that T. D. Hudspeth hath proved his attendance as a witness on behalf of the pl'ffs 2 days, and traveled 24 miles to and from, at this term of court, for which he is entitled to four dollars and twenty c'ts.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL.
vs. } No. 4260.
AMERICAN LIFE INSURANCE CO.

I certify that W. L. Roberts hath proved his attendance as a witness on behalf of the pl'ffs 2 days, and traveled 19 miles to and from, at this term of court, for which he is entitled to three dollars and ninety-five c'ts.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL.
vs. } No. 4260.
AMERICAN LIFE INSURANCE CO.

136 I certify that A. A. Roberts hath proved his attendance as a

witness on behalf of the pl'ffs 2 days, and traveled 24 miles to and from, at this term of court, for which he is entitled to four dollars and twenty c'ts.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE CO. } No. 4260.

I certify that James Gary hath proved his attendance as a witness on behalf the pl'ffs, 2 days, and traveled 30 miles to and from, at this term of court, for which he is entitled to four dollars and fifty c'ts.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds county, second district, June term, 1872.

Z. F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE CO. } No. 4260.

137 I certify that H. Smothers hath proved his attendance as a witness on behalf of pl'ffs 2 days, and traveled 24 miles to and from, at this term of court, for which he is entitled to four dollars and twenty c'ts.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE CO. } No. 4260.

I certify that James Marshall hath proved his attendance as a witness on behalf of pl'ffs, 2 days, and traveled 24 miles to and from, at this term of court, for which he is entitled to four dollars and twenty c'ts.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE CO. } No. 4260.

I certify that Dennis McCall hath proved his attendance as a

138 witness on behalf of pl'ffs 2 days, and traveled 24 miles to and from, at this term of court, for which he is entitled to four dollars and twenty c'ts.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE CO. } No. 4260.

I certify that Jane Brown hath proved her attendance as a witness on behalf of pl'ffs 2 days, and traveled 24 miles to and from, at this term of court, for which she is entitled to four dollars and twenty c'ts.

Attest:

N. HODGE, *Clerk.*

THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE CO. } No. 4260.

I certify that Louisa Marshall hath proved her attendance as a witness on behalf of the pl'ffs 2 days, and traveled 24 miles to and
139 from, at this term of court, for which she is entitled to four dollars and twenty c'ts.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE CO. } No. 4260.

I certify that Jane Bright hath proved her attendance as a witness on behalf of pl'ffs 2 days, and traveled 24 miles to and from, at this term of court, for which she is entitled to four dollars and twenty c'ts.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE CO. } No. 4260.

I certify that Minda Brown hath proved her attendance as a witness

on behalf of the pl'ffs 2 days, and traveled 24 miles to and from, at this term of court, for which she is entitled to four dollars and twenty c'ts.

Attest: N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

140 THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL. *vs.* AMERICAN LIFE INSURANCE CO. } No. 4260.

I certify that Oscar Carter hath proved his attendance as a witness on behalf of the pl'ffs 2 days, and traveled 24 miles to and from, at this term of court, for which he is entitled to four dollars and twenty c'ts.

Attest: N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL. *vs.* AMERICAN LIFE INSURANCE CO. } No. 4260.

I certify that Hubbard Strange hath proved his attendance as a witness on behalf ot the pl'ffs one day, and traveled 2 miles, to and from, at this term of court, for which he is entitled to one dollar and sixty c'ts.

Attest: N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

141 THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL. *vs.* AMERICAN LIFE INSURANCE CO. } No. 4260.

I certify that Wash. Robinson hath proved his attendance as a witness on behalf of the pl'ffs one day, and traveled 24 miles, to and from, at this term of court, for which he is entitled to two dollars and seventy c'ts.

Attest: N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL. *vs.* AMERICAN LIFE INSURANCE CO. } No. 4260.

I certify that Joshua Stone hath proved his attendance as a witness

on behalf of the pl'ffs one day, and traveled 24 miles, to and from, at this term of court, for which he is entitled to two dollars and seventy c'ts.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

142 THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE CO. } No. 4260.

I certify that M. Hodgson hath proved his attendance as a witness on behalf of the def't 2 days, and traveled 28 miles, to and from, at this term of court, for which he is entitled to four dollars and forty c'ts.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE CO. } No. 4260.

I certify that E. Matthews hath proved his attendance as a witness on behalf of the def'd'ts 2 days, and traveled 28 miles, to and from, at this term of court, for which he is entitled to four dollars and forty c'ts.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

143 THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE CO. } No. 4260.

I certify that John G. Sparrow hath proved his attendance as a witness on behalf of the def'd'ts one day, and traveled 24 miles, to and from, at this term of court, for which he is entitled to two dollars and seventy c'ts.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE CO. } No. 4260.

I certify that C. W. Barber hath proved his attendance as a witness on behalf of the def'd'ts 2 days, and traveled 24 miles, to and from, at this term of court, for which he is entitled to four dollars and twenty c'ts.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

144 THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE CO. } No. 4260.

I certify that B. F. Downing hath proved his attendance as a witness on behalf of the def'd'ts 2 days, and traveled 24 miles, to and from, at this term of court, for which he is entitled to four dollars and twenty c'ts.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE CO. } No. 4260.

I certify that J. Alexander hath proved his attendance as a witness on behalf of the def'd'ts 2 days, and traveled 16 miles, to and from, at this term of court, for which he is entitled to three dollars and 80 c'ts.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

145 THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE CO. } No. 4260.

I certify that W. B. Williamson hath proved his attendance as a witness on behalf of the def'd'ts, 2 days, and traveled 24 miles, to and from,

at this term of court, for which he is entitled to four dollars and twenty cents.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE CO. } No. 4260.

I certify that W. McLinon hath proved his attendance as a witness on behalf of the def'd'ts 2 days, and traveled 24 miles, to and from, at this term of court, for which he is entitled to four dollars and twenty c'ts.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

146 THE STATE OF MISSISSIPPI,
Hinds County:

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE CO. } No. 4260.

I certify that W. O. Harrison hath proved his attendance as a witness on behalf of the def'd'ts 2 days and traveled 24 miles, to and from, at this term of court, for which he is entitled to four dollars and twenty c'ts.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

THE STATE OF MISSISSIPPI, *Hinds County:*

Circuit court of Hinds County, second district, June term, 1872.

Z. F. MAHONE ET AL.
vs.
AMERICAN LIFE INSURANCE CO. } No. 4260.

I certify that J. G. Yeiser hath proved his attendance as a witness on behalf of the def'd'ts one day, and traveled 26 miles, to and from, at this term of court, for which he is entitled to two dollars and eighty c'ts.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

147 *Bill of costs.—Clerk.*

Issuing 1 writ, 8s.; 1 certificate of issuing, 2s.; 1 seal, 2s.	$1 50
1 certificate of cause of action, 2s.; entering 1 return, 2s.	50
Docketing, 2s.; entering 1 appearance, 2s.	50
3 continuances, @ 2s.; filing papers and certificate of filing, 6s.	1 50
4 motions, @ 2s.; 10 orders, @ 2s.	3 50
Swearing and empannelling 1 jury, 2s.	25
Receiving and entering 1 verdict, 2s.	25
Swearing 25 witnesses, @ 10 c'ts; entering 4 judgments, @ 2s.	3 50
Issuing 21 subpœnas, @ 4s.; 76 additional names, @ 10 c'ts	18 10
2 affidavits and certificates, @ 2s.	50
Taxing costs, 4s.; certificate, 2s.; copy, 6s.	1 50
1 bond, 6s.; issuing 61 witness certificates, @ 2s.	13 50
Transcript for U. S. court	51 66
Certificate, 2s.; seal, 2s.	50
Clerk, N. Hodge, (assigned to dep. cl'k B. F. Edwards)	$97 26
Amount carried over	
Amount brought over	$97 26

Sheriff's costs.

Executing 1 writ on 1 defendant	1 50	
Entering and returning 1 writ, 4s.; 1 copy, 4s.	1 00	
Summoning 69 witnesses, @ 4s.	34 50	
Entering and returning 19 writs of subpœna, @ 4s.	9 50	
Empannelling 1 jury, 20 c'ts; jury tax, $3.00	3 20	
		$49 70
Sheriff Lake, J. L., j'r	$8 00	
" J. M. Coats	$36 20	
" C. E. Furlong	1 50	
" R. J. Ross	1 00	[over.]

148 Witness-fees, to wit:

J. T. Cox	$12 90	
W. T. Mahon	12 90	
W. W. Nesmith	12 90	
W. B. Stewart	8 70	
Eli McMullen	12 50	
T. D. Hudspeth	4 20	
W. L. Roberts	10 80	
A. A. Roberts	12 90	
James Garey	9 00	
Henry Smothers	12 90	
James Marshall	4 20	
Dennis McCall	4 20	
Lou. Marshall	12 90	
Wash. Black	8 70	
	$139 70	
		$139 70
Amount carried over		$286 66

Total am't bro't over			$286 66
Amount witnesses' fees, bro't over	$139 70		
Jane Brown	4 20		
Jane Bright	12 90		
Minda Brown	12 90		
Oscar Carter	4 20		
Hubbard Strange	1 60		
Wash. Robinson	11 40		
Joshua Stone	2 70		
M. Hodgson	4 40		
E. Matthews	4 40		
149 John G. Sparrow	2 70		
C. W. Barber	4 20		
Nat. McGowen	7 20		
A. P. Harris	7 20		
B. F. Downing	12 90		
J. Alexander	12 10		
W. B. Williamson	9 90		
J. H. Frieze	7 20		
M. McLinon	12 90		
W. O. Harrison	11 40		
J. G. Yeiser	2 80		149 20
	$288 90		$435 86

This cost bill is entitled to the following credits, as clerk's cost, to wit:

Paid by pl'ffs	$15 00	
" " def'd'ts for transcript, certificate, and seal	52 16	
		$67 16
Balance costs due		$368 70

Transferred to the circuit court of the United States for the southern district of Mississippi, on motion and petition of defendants, on the 14th day of June, A. D. 1872.

Attest:

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

150 THE STATE OF MISSISSIPPI,
Hinds County:

I, N. Hodge, clerk of the circuit court in and for the county and State aforesaid, do hereby certify that the foregoing 123 pages and this page do contain true, full, complete, and perfect copies of all process, pleadings, depositions, testimony, and other proceedings had and done in the court aforesaid, in the case of Zenora F. Mahone and W. C. D. Mahone, her husband, against The American Life Insurance Company, as the same appears of record and on file in my office.

In testimony whereof I have hereunto subscribed my name, and affixed the seal of said court, at office in Raymond, this 2nd day of August, A. D. 1872.

[L. S.]

N. HODGE, *Clerk*,
By B. F. EDWARDS, *D. C.*

Transcript filed, and $10 on ⅜ cl'k's fees deposited by def'ts, Octo. 30, '72.

GEO. T. SWANN, *Clk.*

151 Upon the filing of said transcript of record from the circuit court of Hinds County, for the second district thereof, in the said circuit court of the United States for the southern district of Mississippi, the following pleadings, proceedings, orders, and judgments were had and rendered in and by said circuit court of the United States, in this cause, to wit:

On the 9th day of November, 1872, came the plaintiffs, by attorneys, and filed in said circuit court of the United States for the southern district of Mississippi their replication to the amended and supplemental plea filed by defendants herein, on the 13th June, A. D. 1872, as fol lows, to wit:

United States court, circuit court south'n dist. of Miss., Nov. term, A. D. 1872.

Z. F. AND W. C. D. MAHONE
vs. } 1649.
AMERICAN LIFE INS. CO.

And for replication to the amended and supplemental plea filed by defendants herein on the 13th June, A. D. 1872, by leave of the court, said plaintiffs say precludi non; because they say that the said
152 policy of insurance on the life of said Leonidas Dillard, which is sued on in this action, was not void and of no effect, at the time of its issuance and execution, under and by reason of any certain representations alleged by said defendants in their said amended plea, to have been false and fraudulent, and to have been made by said Leonidas Dillard in his proposals to said defendants, for the execution and issuance of the said policy of insurance, in that, in reply to question No. 15, in said proposals, which is in these words, to wit: "Has a proposal been made for insuring the life" (intending thereby the life of the said Leonidas Dillard) "in this or any other office," (intending thereby to refer to any other life-insurance company,) "and, if so, whether accepted or declined? If insured, state in what company and in what amounts;" said Leonidas Dillard answered as follows, to wit: "Insured in Equitable $5,000.00," thereby intending to induce said defendants to believe, and which did so induce said defendants to believe, that the life of the said Leonidas Dillard was, at the time of said answer, *was* insured in the Equitable Life
153 Assurance Society of New York, at and for the sum of five thousand dollars; they deny that said answer was false and fraudulent, and made to impose upon and deceive the said defendants, and induce them to execute and issue the said policy of insurance on his life, which is the subject of this suit, improperly; and they also deny that said defendants were imposed upon and deceived into the execution and issuance of the said policy of insurance, and that the same, by reason thereof, was and is void and of no effect; and, on the contrary, they, the said plaintiffs, aver and say that said representations and said answer to said question No. 15 were honestly and truthfully made by the said Leonidas Dillard, and was in fact true, that said Leonidas had been insured in the Equitable Life Assurance Company of New York, for the sum of five thousand dollars; and had lapsed from fail-

ure to pay the premium thereon, as was well known to the authorized agent of the said defendants, John G. Yeiser, who acted as agent of said defendants in effecting the insurance policy now here sued
154 on, and in point of fact was *the* also the agent of the Equitable Life Insurance Company of New York, and as such agent effected the insurance of the life of said Leonidas Dillard in said last-named insurance company, for five thousand dollars, before the time when the proposals for the policy of insurance now sued on were made; and so they say that they ought not to be barred or precluded of their aforesaid action by reason of anything in said amended and supplemental plea, contained, and of all which matters they pray that due inquiry may be made by the country, &c.

HOOKER AND WITHERS, *P. Q.*

Filed Nov. 9, 1872.

GEO. T. SWANN, *Clk.*

And afterwards, on the 12th day of November, 1872, the following motion to strike out notice attached to plaintiffs' replication to 1st plea was filed by the defendant and entered on the motion-docket of said court, to wit:

Circuit court U. S., southern dist. Missi., November term, 1872.

Z. F. AND W. C. D. MAHONE
vs. } 1649.
AMERICAN LIFE INSURANCE CO.

The defendants, by counsel, moves the court to strike out and
155 exclude from the record the notice filed by the plaintiff attached to the plaintiffs' replication to the first plea of said defendant, because said notice is not allowable according to law, as part of the pleadings and proceedings in said cause. Said notice being found on the 36, 37, and 38 pages of the transcript of record filed in this court.

B. F. SEMMES,
T. J. AND F. A. R. WHARTON,
A. H. HANDY,
Att'ys for Def't.

Filed and ent'd Mo. D., p. 56, 12th Nov., 1872.

G. T. SWANN, *Clk.*

And afterwards, to wit, on the 21 day of November, 1872, came the said defendant by her attorneys, and filed a demurrer to the replication of said plaintiffs filed on the 9 November, 1872, to the plea of said defendant filed on the 13th June, 1872, which said demurrer is as follows, to wit:

Circuit court, U. S., southern dist. of Mississippi, November term, 1872.

Z. F. AND W. C. D. MAHONE
vs. } 1649.
AMERICAN LIFE INSURANCE CO.

And the said defendant, as to the replication of the said plaintiffs filed on the 9 November, 1872, to the plea of said defendant
156 filed on the 13 June, 1872, by her attorneys, comes and says that

the said replication and the matters and things therein contained, in manner and form as in said replication set forth, are not sufficient in law for the said plaintiffs to have and maintain their aforesaid action thereof against said ; and this the said defendant is ready to verify; where' said defendant prays judgment, &c.

And for grounds of demurrer said defendant sets forth the following in said replication:

1. Said replication attempts to vary and control by parol evidence the material terms of the said written proposal and answer (which were in writing) set out in said plea and therein referred to.

2. Said replication neither denies nor traverses the allegations of said plea as to the answer of said Dillard, that he was insured in another insurance company at the time of said Dillard's making said answer, as stated in said plea; nor does said replication confess or avoid the averments of said plea as to the fact of said Dillard making answer to said question 15, as alleged in said plea.

157 3. Said replication is no sufficient answer in law to the material averments of said plea.

4. Said replication attempts to set up mere evidence in reply to said plea, and which evidence, if it was allowable in pleading, shows no sufficient reply to the allegations of said plea, and is inadmissible.

5. Said replication is argumentative and not a proper or sufficient answer to the grounds of defence *stated* forth in said plea.

6. Said replication sets up affirmative matter as an answer to the said plea, and yet concludes to the country.

7. Said replication is in all respects uncertain, informal, and insufficient.

SEMMES AND WHARTONS AND A. H. HANDY,
Attorneys for Def't.

The plaintiffs join in demurrer; joins in the aforegoing demurrer, in short, by consent of counsel.

WITHERS AND HOOKER, *P. Q.*
SEMMES AND WHARTON AND
A. H. HANDY,
For Def't.

Filed Nov. 21, 1872.

GEO. T. SWANN, *Clk.*

158 And on the 25th day of November, 1872, the same being a day in the regular term of said circuit court of the United States for the southern district of Mississippi, begun and held at Jackson, in said district, on the first Monday and fourth day of November, A. D. 1872, as stated in the caption hereof, the following order was made in this cause by said court, and entered upon the minutes thereof, to wit:

Z. F. AND W. C. MAHONE
vs. } 1649.
AMERICAN LIFE INS. CO.

This day came on to be heard the motion of defendants to strike out and exclude from the record the notice filed by the plaintiff' attached to the plaintiffs' replication to the first plea of said defendants, because said notice is not allowable according to law as part of the pleadings and proceedings in said cause, said notice being found on the 36, 37,

and 38 pages of the transcript of the record filed in this court; and the same being argued by counsel, and the court being fully advised thereon, it is ordered by the court that said motion be, and the same is hereby, overruled, to which action of the court in overruling said
159 motion the defendant now excepts, and tenders his bill of exceptions, which is allowed by the court.

And on the 26th day of November, 1872, it being another day in said regular term of said circuit court of the United States, begun and held on the 1st Monday of November, 1872, the following order was made in this cause by said court, and entered upon the minutes thereof, to wit:

ZENORA F. MAHONE AND W. C. D. MAHONE
vs.
THE AMERICAN LIFE INS. CO. } No. 1649.

Pending the argument of defendant's demurrer to plaintiffs' replication to their plea, filed by leave of court on the 13th of June, 1872, plaintiffs confessed the demurrer, and thereupon it was adjudged by the court that the said demurrer to said replication be, and the same is hereby, sustained, and that plaintiffs have leave to answer over, and thereupon plaintiffs filed their replication to said plea.

The replication of said plaintiffs to said plea of 13th June,
160 1872, filed by defendants, filed by said plaintiffs, and referred to in the last preceding order of court, is in the words and figures following, to wit:

In the circuit court of the United States for the southern district of Mississippi.

ZENORA F. MAHONE AND W. C. D. MAHONE
vs.
THE AMERICAN LIFE INSURANCE COMPANY. } No. 1649.

And for replication to the further plea filed herein by defendants by leave of court, on the 13th of June, 1872, and numbered 5th plea, said plaintiffs, by leave of the court first had and obtained, say precludi non, because *because* they say that the said policy of insurance sued on in this action was not void and of no effect at the time the same was executed and issued by said defendants, by reason of certain false and fraudulent reprsesentations made to said defendants by Leonidas Dillard in his proposals to said defendants for the execution and issuance of said policy of insurance, in this, to wit, that to question No. 15, in said proposal, said Leonidas Dillard answered, "Insured in Equitable $5,000," thereby intending to induce said
161 defendants to believe, and which did induce said defendants to believe that the life of said Leonidas Dillard was at the time of said answer insured in the Equitable Life Insurance Society of New York for the sum of five thousand dollars, in manner and form as alleged in said plea; plaintiffs deny that said Leonidas Dillard falsely and fraudulently answered that his life was at that time insured in the Equitable Life Insurance Society of New York for $5,000; they deny that he made any false and fraudulent representations to said defendants in his answer to said question. They deny that said Leonidas Dillard in his answer to said question intended to induce, and did so in-

duce, said defendants to believe that his life was at the time insured in the Equitable Life Assurance Society for $5,000. They deny that the answer of said Dillard to said question No. 15 was false and fraudulent, and was so made by him for the purpose of imposing upon and deceiving said defendants, and that by reason thereof said policy of insurance sued on is void and of no effect.

And said defendants aver that the answer of said Leonidas
162 Dillard to said question No. 15, as well as his answers to all the other questions in his proposal for insurance, were written down by John G. Yeiser, the regularly authorized district agent of said defendants to solicit persons to insure their lives in def't's company; and that said Leonidas Dillard did not in fact answer in response to said question No. 15 that his life was at that time insured in the Equitable, but that it had been *been* insured in the Equitable for $5,000, which fact was well known to said John G. Yeiser, agent of defendants as aforesaid, and said John G. Yeiser, agent as aforesaid, well knew, at the time said answer was made, that the $5,000 policy which had been issued on the life of said Dillard by the Equitable had lapsed, or been forfeited, for the reason that the premiums had not been promptly paid thereon; and with a full knowledge of the facts, he, the said John G. Yeiser, agent of defendants as aforesaid, of his own motion abbreviated the answer made by the said Leonidas Dillard, and wrote it down as it appears in said proposal and not as answered by said Leonidas Dillard, and this plaintiffs pray*s* may be inquired of by the country.

WITHERS AND HOOKER, *P. Q.*

163 And the said defendant doth the like.

SEMMES AND HANDY,
For Def'ts.

Filed by leave of court Nov. 26, '72.

GEO. T. SWANN, *Clk.*

And on the 26th Nov., 1872, the following demurrer to replication to plea, filed 13th June, 1872, was filed in this cause, to wit:

ZENORA F. MAHONE & AL.
vs.
THE AMERICAN LIFE INSURANCE COMPANY. } 1649.

And the said defendant, as to the replication of said plaintiffs to the plea of defendant filed June 13, 1872, says that said replication and the matters and things therein contained, as therein set forth, are not sufficient in law for the said plaintiff to have and maintain his action thereof, and this the said defendant is ready to verify; wherefore she prays judgment, &c.

And said defendant sets down and states the following grounds of demurrer:

I. That said replication is double, in this, that it contains several distinct and substantive answers to said plea:

164 1st. In denying that said answer 15 was false and fraudulent.

2. That said Dillard, in said answer, intended to induce said defendants to believe that his, said Dillard's, life was insured in said Equitable Assurance Society.

3. In denying that said answer to question 15 was not made by said Dillard.

II. Said replication is argumentative.

III. Said replication contains mere matter of evidence, and is not issuable.

IV. Said replication attempts to put in issue matters contained and set forth in other pleas and pleadings in the cause.

V. Said replication does not deny that the said alleged answer to said question, which is stated in said replication to have been written by said Yeiser, was not so written by said Yeiser with the knowledge and consent of said Dillard.

SEMMES AND WHARTONS, AND
A. H. HANDY,
Attorneys for Defendants.

Filed 26 Nov. 1872.

GEO. T. SWANN, *Clk.*

165 And on the 26th Nov., 1872, the following further replication to the first plea pleaded by said defendants was filed herein, to wit:

Circuit court of the United States for southern district of Mississippi.

ZENORA F. MAHONE AND W. C. D. MAHONE
vs.
AMERICAN LIFE INS. CO. } No. 1649.

And for further replication to first plea pleaded by said defendants, plaintiffs, by leave of court first had and obtained, say precludi non, because, they say that the policy of insurance sued on was not void and of no effect at the time the same was issued, by reason of certain false and fraudulent representations made to defendants by Leonidas Dillard in his proposals to said defendants for the execution and issuance of said policy of insurance, and that Leonidas Dillard did not answer "yes" to said question No. 5; but, on the contrary, plaintiffs aver that the answer to said question No. 5, as well as the answers to all the questions contained in said application, were written down by John G. Yeiser, the regularly authorized agent of said defendants to solicit and obtain parties to insure their lives in defendant's company, and were not
166 written by said Leonidas Dillard nor by said plaintiffs or either of them, but, instead of answering "yes," to said question No. 5, said Leonidas Dillard, when the said question No. 5 was propounded him, inquired of said John G. Yeiser, agent as aforesaid, what was intended to be embraced in said question, and said John G. Yeiser, agent as aforesaid, responded that it had reference to his eating, drinking, and sleeping, and thereupon said Dillard responded, in answer to said question, that "So far as drinking is concerned, I never refuse," or words to that effect, and said Yeiser, agent of defendants as aforesaid, was requested to write down the answer, "he always takes his drinks," or, "so far as drinking is concerned, I never refuse," or words to that effect, and that said John G. Yeiser, agent as aforesaid, notwithstanding said answer was given by said Dillard as aforesaid, of his own motion took the responsibility of writing down said answer, "yes," though said Dillard did not so answer, but answered as aforesaid.

And plaintiffs further aver that said Dillard never read over said answer to said question No. 5, nor did he read over the answers to
167 any of said questions before signing them. And this pl'ffs are ready to verify; wherefore they pray judgment, &c.

WITHERS AND HOOKER, *P. Q.*

Before me, George T. Swann, clerk of the circuit court of the United States for the southern district of Mississippi, personally appeared W. C. D. Mahone, who made oath that he is advised and believes that he has just ground to traverse the matters traversed in the foregoing replication, and that the several matters of confession and avoidance set forth and plead in the foregoing replication are respectively true in substance and in fact.

W. C. D. MAHONE.

Sworn to and subscribed before me in open court Nov. 26, '72.

GEO. T. SWANN, *Clk.*

Filed Nov. 26, 1872.

GEO. T. SWANN, *Clk.*

And on the 26th Nov., 1872, the following rejoinder of defendants to plaintiffs' 2nd replication to defendants' 1st plea was filed in this cause, to wit:

Circuit court U. S., November term, 1872, south. dist. of Miss.

Z. T. MAHONE & AL.
vs.
AMERICAN LIFE INS. CO. } No 1649.

168 And the said defendant, for rejoinder to the second or further replication of said plaintiffs to the first plea of said defendants in this cause, say actio non, &c., because, she says that, after the signing and execution of the application of said Dillard, and his answer thereto, as written in said application in said first plea referred to, the said Dillard signed and executed his certain declaration in writing, whereby he, the said Dillard, declared that the proposals mentioned in said plea, including the question 5 and the answer annexed thereto, as set forth in said plea, should be the basis and condition of said contract of insurance between himself and said company; and that if at any time thereafter, the said company, the defendant, should discover that any fraudulent or untrue allegation was contained in said proposal and answers thereto, or in said proposals or any material statement of facts therein, regarding the condition or health of the said Dillard, that said policy of insurance should become null and void; which said declaration was, by agreement of the parties, made a part and condition of said policy of insurance, at the time the same was issued, and was declared
169 thereon that said policy was issued by said defendant and accepted by said Dillard on the faith thereof.

And the said defendant avers that said answers, proposal, and declaration were truly transmitted by the agent of said defendant, after the same were fully executed, to said defendant, and on faith of the truth thereof as stated in said declaration and answers, the said policy was issued by said defendant and accepted by the said Dillard, as stated in said proposals, answers, declaration, and policy.

And this said defendant is ready to verify; wherefore she prays judgment, &c.

SEMMES AND HANDY,
For Defendant.

Filed Nov. 26, '72.

G. T. SWANN, *Clk.*

And thereupon on said 26th November, 1872, the said plaintiffs, by counsel, filed the following demurrer to the foregoing rejoinder of said defendant, to wit:

ZENORA F. MAHONE AND W. C. D. MAHONE
vs.
THE AMERICAN LIFE INS. CO. } 1649.

And now comes said plaintiffs and demur to defendant's re-
170 joinder to plaintiff's further or second replication to defendant's first plea, and says the same is not sufficient in law, and assigns for cause of demurrer as follows:

1st. Said rejoinder does not respond to any of the facts set forth in the replication.

2nd. Said rejoinder does not traverse, nor does it confess and avoid, a single allegation of plaintiffs' replication.

3. Said rejoinder sets up matters of law in response to the matters of fact pleaded in said replication.

4. Said rejoinder is argumentative and insufficient.

Wherefore plaintiffs pray judgment, &c.

WITHERS AND HOOKER, *P. Q.*

Filed Nov. 26, '72.

GEO. T. SWANN, *Clk.*

And on said 26th day of Nov., 1872, a day in said regular term of said court, as set forth in the caption hereof, the following order was made in this cause and entered on the minutes, to wit:

ZENORA F. MAHONE AND W. C. D. MAHONE
vs.
AMERICAN LIFE INS. CO. } 1649.

It is ordered that plaintiffs' demurrer to defendant's rejoinder
171 to 2nd replication of plaintiffs to defendant's first plea be, and the same is hereby, sustained, and defendants have leave to plead over.

And on said 26th day of November, 1872, the following withdrawal of the third and fourth pleas pleaded by defendant was filed in this cause, to wit:

Circuit court U. S., November term, 1872.

Z. F. MAHONE AND W. C. D. MAHONE
vs.
AMERICAN LIFE INS. CO. }

In the above case comes the defendant, by her attorneys, and withdraws the following pleas:

1. The third plea of defendant marked "3rd," and found on pages 13, 14, and 15 of the transcript of the record filed in this cause, to wit:

"3rd. And for a further plea in this behalf, said defendants, by their attorneys, say: That said plaintiffs ought not to have and maintain their aforesaid action against them, because they say that the said policy of insurance on the life of said Leonidas Dillard, which is set

out in their declaration hereof against these defendants, was
172 void and of no effect at the time the same was executed and issued by these defendants, because the same was so executed and issued by these defendants under and by reason of certain false and fraudulent representations made to them by the said Leonidas Dillard in his proposals to them for the execution and issuance by them of said policy of insurance, which said proposals are referred to in said policy of insurance as bearing date the 30th day of August, 1870, as 'upon the full faith of which this policy is issued,' and a copy of which said proposals is herewith filed as part of this plea, as fully and to all intents and purposes as if the same were herein copied, and which is marked No. 1 in this, to wit: That to question No. 15 in said proposals, which is in these words, to wit, 'Has a proposal been made for insuring the life'—intending thereby to refer to the life of said Leonidas Dillard—'in this or any other office'—intending thereby to refer to any other life-insurance company—'and, if so, whether accepted or declined? If insured, state in what company, and for what amount;"
173 said Leonidas Dillard answered as follows, to wit: 'Insured in Equitable, $5,000,' thereby intending to induce said defendants to believe, and which did so induce them to believe, that the life of said Leonidas Dillard had been insured in the Equitable Life Insurance Company of New York at and for the sum of five thousand dollars.

"And said defendants aver that at the time of making said answer the life of said Leonidas Dillard had not been insured by said Equitable Life Insurance Company of New York for any amount of money whatever, and that said answer of said Leonidas Dillard herein last referred to was false and fraudulent, and was so made by him for the purpose of imposing upon and deceiving said defendants, and to induce them to execute and issue said policy of insurance on his life. Wherefore said defendants aver that, by reason of said false and fraudulent answer so made by said Leonidas Dillard as lastly herein referred to, they were imposed upon and deceived into the execution and issuance of said policy of insurance on the life of said Leonidas Dillard, and that by reason of said false and fraudulent answer said policy of insurance
174 on the life of said Leonidas Dillard is void and of no effect. All of which defendants are ready to verify; wherefore they pray judgment, &c.

"SEMMES AND COOPER AND
"T. J. AND F. A. R. WHARTON,
"*Attorneys for Defendants.*"

2. The plea marked 4th:

"4th. And for a further plea in this behalf, said defendants, by their attorneys, say, that said plaintiffs ought not to have and maintain their aforesaid action hereof against them, because they say that said plaintiffs did not at any time before the institution of their aforesaid suit hereof make satisfactory proof to these defendants of the death of said Leonidas Dillard, according to the terms and conditions of said policy of insurance on the life of said Leonidas Dillard. And this said defendants pray may be inquired of by a jury, &c.

"SEMMES AND COOPER AND
"T. J. AND F. A. R. WHARTON,
"*Atto's for Defendants.*"

And found and contained on page 16 of said transcript of record.

SEMMES, WHARTON, AND
A. H. HANDY,
Attorneys for Defendants.

Filed Nov. 26, 1872.

GEO. T. SWANN, *Clk.*

175 And on said 26th day of November, 1872, the said defendant, by attorneys, filed a sixth plea to the plaintiff's declaration, which is as follows, to wit:

6th.

Z. F. MAHONE AND W. D. C. MAHONE
vs.
AMERICAN LIFE INS. CO.

And the said defendant, by attorneys, by leave of the court first had and obtained, for further plea to the said plaintiffs' declaration, says actio non, &c., because the said defendant says that the said policy of insurance in said plaintiffs' declaration mentioned, was issued and executed by said defendant in consideration of a certain warranty and declaration in writing made to the said defendant by said Dillard, in said declaration named, before the execution and issuing of *of* said policy of insurance, which said warranty and declaration in writing were made by said Dillard in his written proposal and application to said defendant for the issuing of said policy to him, which said proposals and written declaration are referred to in said policy as
176 bearing date the 30th day of August, 1870, as upon the full faith of which said application and answers therein contained, and of said written declaration, said policy was issued, and were agreed by and between said Dillard and said defendant in the said written application, proposals, and declaration, to be the basis, and upon the full faith of which said policy of insurance was issued, which said proposals, answers, and declaration are herewith filed, to wit, as attached to and accompanying the first plea of the defendant in this case.

And the said defendant avers that, in and by said proposals, answers, and declaration so made part of said policy, and upon the basis and in faith of which and of the several answers made by said Dillard and afterwards acknowledged by said Dillard in his declaration attached to said proposal and answers, the said policy was issued, the said proposal and application contained the following question to be truly answered by said Dillard, to wit: "Has a proposal been made for insuring the life"—meaning thereby the life of said Dillard—"in this or any other office"—meaning thereby any other life-insurance office or company of life insurance—"and, if so, whether accepted
177 or declined? If insured, state in what company and for what amount." To which said question so propounded said Dillard answered thus: "Insured in Equitable for $5,000." And the said defendant avers that the said Dillard undertook to answer said question in full, according to its true import, and that he intended to cause said defendant to believe that said Dillard was, at the time of said answer, insured in the Equitable Life Assurance Society of the United States; and thereby, and by said answer and "declaration," said Dillard fraudulently and falsely suppressed the fact, which said defendant

avers to be true, that he, the said Dillard, had, before the time of said proposals, answer, and declarations, to wit, some time in the year 1870, made application and proposals to the said Equitable Life Assurance Company of New York, or to the Continental Life Insurance Company, or both of said companies, and that his said application to said companies, or either of them, had been refused, and that said companies last mentioned, or either of them, had refused to accept said application, and to issue policies or any policy thereon.

178 And the said defendant avers that, by reason of said false and fraudulent suppression of the fact that said Dillard had been refused to be insured by said last-mentioned companies, or either of them, the said policy of insurance here sued on became and was void and of no effect; and this the said defendant is ready to verify. Wherefore said defendant prays judgment, &c.

WHARTONS, SEMMES AND A. H. HANDY,
Att'ys for Def't.

Filed 26 Nov., '72.

G. T. SWANN, *Clk.*

And on said 26th Nov., 1872, the following replication to said 6th plea was filed herein, to wit:

ZENORA F. MAHONE AND W. C. D. MAHONE
vs.
THE AMERICAN LIFE INS. CO.

And said plaintiffs, for replication to the sixth plea filed by said defendants say, precludi non, because they say that said policy of insurance sued on was not void and of no effect by reason of said Leonidas Dillard having in his answer to said question No. 15 falsely and

179 fraudulently suppressed any facts in manner and form as in said plea alleged. And plaintiffs deny that said Leonidas Dillard, in his answer to said question number 15, fraudulently and falsely suppressed the fact that the Equitable Life Assurance Society of New York, or the Continental Life Insurance Company, or both of them, had refused an application to insure the life of the said Leonidas Dillard in manner and form as alleged in said plea. On the contrary, plaintiffs aver that said Dillard had received no answer to his said applications for insurance on his life at the time of his application for insurance to defendants on the 30th of August, 1870; and so plaintiffs say that said policy of insurance sued on was and is not void and of no effect. And of this they put themselves upon the country.

WITHERS AND HOOKER, *P. Q.*

And the defendants doth the like.

SEMMES AND HANDY,
Att'ys for Def't.

Filed Nov. 26, '72.

G. T. SWANN, *Clk.*

180 And on the 27th day of November, 1872, the following amended rejoinder to the second or "further" replication of plaintiffs to the first plea of defendants was filed herein, to wit:

Circuit court U. S., November term, 1872, southern dist. of Mississippi.

Z. F. MAHONE & AL.
vs.
AMERICAN LIFE INS. CO.

And the said defendants, for rejoinder to the second or "further" replication of said plaintiffs to the first plea of said defendant in said cause, says actio non, &c., because said defendant says that after the signing and execution of the said application or proposal of the said Dillard to the several answers therein contained, and his several answers thereto as written in said application, and after the same had been read over to said Dillard, and he had consented to and signed his name in testimony thereof at the end thereof, which said defendant avers was fully and fairly done, the said Dillard, with a full knowledge thereof, and of the nature and contents of the paper subjoined to said proposal and answers, and styled "declaration," signed and executed the said "declaration" in writing, whereby he, the said
181 Dillard, declared that the proposals mentioned in said first plea, including the question 5 therein, and the answer annexed to said question 5 as set forth in said plea, should be the basis and condition of said contract of insurance between himself and the said defendant, and that if, at any time thereafter, the said defendant should discover that any fraudulent or untrue allegation was contained in said proposal and answers thereto, or in any material statement of facts contained therein regarding the condition or health of said Dillard, that policy of insurance should become null and void, which said declaration was fully understood by said Dillard, and by the agreement between said parties was made a part and condition of said policy of insurance; and said policy was issued by said defendant and accepted by said Dillard on the faith of said declaration and agreement.

And the said defendant avers that said answers, proposal, and declaration, after the same were executed and agreed upon as aforesaid, were duly transmitted by the agent of said defendant, who took said proposal, answers, and declaration; were transmitted by said agent
182 to said defendant, in order to obtain the said policy sued on; and on the faith of the truth thereof, as stated in said proposal, answers, and declaration, after the same were received by said defendant, the said policy of insurance was issued by said defendant and accepted by said Dillard, on the terms stated in said answers, declaration, and policy. Wherefore the said defendant avers that by reason of the premises, and of the false and fraudulent statements and answers as set forth in said plea, the said plaintiffs are concluded of claiming any benefit of the said policy of insurance.

And this the said defendant is ready to verify; wherefore said defendant prays judgment, &c.

SEMMES AND A. H. HANDY,
Att'ys for Def't.

Filed Nov. 27, '72.

G. T. SWANN, *Clk.*

And on the said 27th day of November, 1872, the following sur-rejoinder was filed by plaintiffs to defendant's rejoinder to plaintiffs' second replication to defendant's first plea, to wit:

183 ZENORA F. MAHONE AND W. C. D. MAHONE
vs.
THE AMERICAN LIFE INSURANCE COMPANY. } 1649.

And said plaintiffs, for sur-rejoinder to defendant's rejoinder to their second replication to defendant's first plea, say precludi non, because they say that the said policy of insurance sued on was not void and of no effect by reason of any false or fraudulent representation contained in the answer of said Leonidas Dillard to said question number 5. Plaintiffs state that said Leonidas Dillard did not answer "yes" to said question number 5, but answered as set forth in their said second replication, and never answered yes, or agreed that said answer yes should be written down by said John G. Yeiser, agent of defendant's, as the answer of said Leonidas Dillard to said question; and that when said Leonidas Dillard signed said application, declaration, and proposals, he did not sign the same with the full knowledge that the answer yes, as written down by said Jno. G. Yeiser, agent of defendants as
184 aforesaid, was the only answer written down by said Yeiser, agent of defendants as aforesaid, to said question number 5, and that said answer yes to question number 5 was not read over to said Dillard before he, the said Dillard, signed said application, declaration, and proposals, and that said Dillard did not sign the same with the full knowledge that his, said Dillard's, answer had been written down yes, and not otherwise, and not as answered by said Dillard as set forth in plaintiffs' second replication to def't's first plea, and said Yeiser, agent of defendants, when he so wrote down the answer yes, well knew that said Dillard had answered said question No. 5 that he did take his drinks, as answered by said Dillard; and well knew that said Dillard did take his drinks, as answered by said Dillard.

And said plaintiffs deny that said defendants were fraudulently deceived, deluded, and defrauded into the issuance and execution of said policy by reason of any false or fraudulent answer made by said Leonidas Dillard to said question number 5, in manner and form as the same is set up and pleaded in said first plea and rejoinder of defendants.

185 And of this they, said plaintiffs, put themselves upon the country.

WITHERS AND HOOKER, *P. Q.*

The defendants demur in short by consent of counsel to the above sur-rejoinder, both for all matters of form and matters of substance arising thereon as if said grounds of demurrer were particularly stated and this demurrer was in due form.

A. H. HANDY, *for Def'ts.*
WITHERS AND HOOKER, *Att'ys for Pl'ffs.*

Filed Nov. 27, '72.

GEO. T. SWANN, *Clk.*

And on said 27th day of November, 1872, a day in said November term, 1872, of said circuit court of the United States, begun and held as stated in the caption hereof, the following order was made in this cause by said court and entered on the minutes thereof, to wit:

ZENORA F. MAHONE AND W. C. D. MAHONE
vs.
THE AMERICAN LIFE INSURANCE COMPANY. } 1649.

Pending the argument on defendant's demurrer to plaintiffs' sur-

186 rejoinder to defendant's rejoinder to plaintiffs' second or further replication to defendant's first plea, plaintiffs', by leave of the court first had and obtained, withdrew their second or further replication to defendant's first plea.

And again, on said 27th day of November, 1872, the following other order was made in this cause by said court and entered upon the minutes thereof, to wit:

Z. F. AND W. C. D. MAHONE
vs.
AMERICAN LIFE INS. CO. } 1649.

This day came the parties, by their attorneys, and issue being joined thereupon, come a jury, to wit: W. H. Wilson, P. H. Jones, J. D. S. Davenport, J. J. Rich, Austin Madison, Julius Fall, Ben Hoover, Joseph Hall, Daniel Butler, Henry Garrett, Frank Russell, and Rolla Jackson, who were elected, empannelled, sworn, and charged well and truly to try the issue joined and a true verdict to render according to the evidence, but before rendering their verdict, the jurors were permitted to disperse, by consent of parties, until to-morrow morning 9 o'clock.

187 And on the 28th day of November, 1872, another day of said term of said circuit court of the United States, begun and held on the 1st Monday of November, 1872, the following order was made in this cause by said court, and entered upon the minutes thereof, to wit:

Z. F. AND W. C. D. MAHONE
vs.
AMER. LIFE INS. COMPANY. } 1649.

This day came again the parties and the same jurors as empannelled heretofore, and by order of the court said jurors are again permitted to disperse until to-morrow morning, 9 o'clock.

And on the 29th day of November, 1872, another day of said November term, 1872, of said circuit court of the United States, the following order was made in this cause by said court, to wit:

Z. F. AND W. C. D. MAHONE
vs.
AMERICAN LIFE INS. CO. } 1649.

This day came again the parties, by attorney, and the same jurors who had been permitted to disperse until this day, and it is again
188 ordered that the said jurors have leave to disperse until to-morrow morning, 9 o'clock.

And then afterwards, to wit, on Saturday, November 30th, 1872, the same being also a day in said term of said circuit court of the United States for the southern district of Mississippi, begun and held at Jackson, in said State, on the first Monday of November, 1872, the following verdict and final judgment was rendered in this cause by said court and entered on the minutes thereof, to wit:

Z. F. AND W. C. D. MAHONE
vs.
AMERICAN LIFE INSURANCE COMPANY. } 1649.

This day again came the parties by attorney, and also the same jurors heretofore empannelled and sworn herein, and the issue being submitted to them, the said jurors retired to consider of their verdict, and returned into court the following, to wit: We, the jury, find for the plaintiffs, and assess their damages to the sum of five thousand five hundred and fifty dollars. It is therefore considered by the court that plaintiffs have and recover of the said defendant the damages aforesaid, with
189 interest thereon at the rate of six per cent. per annum from this date until paid, together with the costs in this behalf expended to be taxed, &c.

BILLS OF EXCEPTIONS.

Circuit court U. S., southern district of Mississippi, November term, 1872.

Z. F. MAHONE AND W. C. D. MAHONE
vs.
AMERICAN LIFE INS. CO.

Bill of exceptions No. 1.

Be it remembered that at the trial of said cause, and after the declaration had been read to the jury, the defendant, on whom devolved the affirmative of the issues made by the pleadings in order to maintain the issues on her part, read to the jury the pleas numbered first, second, fifth, and sixth, and the replications and issues thereon of the plaintiffs; and the defendant also read in evidence the question No. 5 to said Dillard, referred to in said defendant's first plea as "proposals," and the answer to said question 5, "yes," as appearing in said "proposals;" and also the question marked "16," and the answer thereto as
190 appearing in said "proposals," which said proposals, questions, and answers are made part of this bill of exceptions, and are in the following words and figures, to wit:

Exhibit No. 1 *to* 1*st and* 3*rd pleas.*

AMERICAN LIFE INSURANCE COMPANY.

Proposals for insurance.

The agent is requested to be particular to have all the questions in this application answered, dates filled up and signed by the applicant, and witnessed.

1.* What is the name and residence of the person for whose benefit the insurance is to be effected? If a married female or widow, state names in full, and also her maiden name. State Christian names in full.

Zenora Florida Mahone, Hinds Co., Miss.; married; Zenora Florida Dillard.

2.* What is the name, residence, and occupation or trade of the person whose life is proposed to be insured? See note as above.

(* On margin.) The first two questions will have the same answer when the applicant insures his own life; different when he insures the life of another.

Leonidas Dillard; farming.

3. Place and date of birth of the life proposed for insurance—State, county, and town; age next birthday.

191 Born at Summerville, Russell County, on the 29 day of March, 1839.

4. Are the party's parents living? if not, at what age, and of what disease did they die? State full name of the father.

Father dead; 72 years; old age.

Mother dead; 60 " fever.

5. Is the party temperate and regular in his habits?

Yes.

6. Has the party had the small-pox or been vaccinated?

Has not had small-pox; been vaccinated.

7. Has the party at any time been afflicted with insanity, gout, asthma, scrofula, convulsions, palsy, appoplexy, consumption, spitting of blood, or any disease of the lungs or throat whatever, or any other disease likely to impair his constitution or shorten life, or been afflicted with disease of the heart or of the urinary organs? if so, which?

Acclimated by reason of life-time residence.

No.

8. Has the party's father, mother, brother, or sister, been afflicted with consumption or any other disease of the lungs, or any other serious family disease, such as scrofula, insanity, &c., &c.?

No.

192 9. Has the party experienced any wound, hurt, or other serious bodily injury?

No.

10. Is the party now in good health, and does he usually enjoy good health?

Yes.

11. Name and residence of the said party's usual medical attendant, to be referred to for information as to the past and general state of health, and how long has he known the party. If no medical attendant, name and residence of an intimate friend competent to give the required information.

Jno. T. Cox, friend; has known him 20 years.

12. Is there any circumstance which renders an insurance on his life more than usually hazardous, such as place of residence, occupation, hereditary predisposition, constitutional infirmity, or other known cause, or any other circumstance or information with which the company ought to be made acquainted?

No.

13. Sum to be insured, (write words in full,) premium how payable.

Five thousand ($5,000) dollars; semi-annually.

14. Term for which the insurance is required.

Life.

193 15. Has a proposal been made for insuring the life in this or any other office; and, if so, whether accepted or declined? If insured, state in what company, and for what amount.

Insured in Equitable, $5,000.

16. Is the applicant aware that any untrue or fraudulent answer to the above queries, or any suppression of facts in regard to health, habits, or circumstances, or neglect to pay the premium on or before the day it becomes due, will vitiate the policy and forfeit all payments made thereon?

Yes.

17. What plan of insurance is desired?
Ord. life, Table No. 6.
Dated at Edwards' Depot this 30 day of August, 1870.
Signature:
(Signed) LEONIDAS DILLARD.
Witness:
(Signed) JNO. G. YEISER,
Dist. Ag't.

Declaration.

I do hereby declare that my age does not exceed 31 years; that I am now in good health and do ordinarily enjoy good health; and in the foregoing proposals I have not withheld any material circum-
194 stance or information touching the past or present state of the health or habits of life with which the American Life Insurance Company ought to be made acquainted.

And I do hereby agree that this declaration and the foregoing proposals shall be the basis and conditions of the contract between myself and the said company; and if at any time hereafter the company shall discover that any frandulent or untrue allegation be contained herein or in the proposals, or any material misstatement of facts regarding the condition or health of the party insured, then, in any and every such case, the said company may refuse to receive further premiums on such insurance, and all moneys paid on account of the same shall be forfeited to the said company, and the policy of insurance made on the faith of this declaration and the proposals shall become null, void, and of none effect.

Dated at Edwards' Depot, Miss., this 30 day of August, A. D. 1870.
Signature:
(Signed) LEONIDAS DILLARD.
Witness:
(Signed) JNO. G. YEISER.

(On margin:) The agent is requested to have this declaration carefully filled up and signed by the applicant and witnessed.

And the said defendants then introduced JOHN G. YEISER as a witness, who testified in substance that said witness was the local agent of said defendant, and as such took and received from said Dil-
195 lard said "proposals;" that said Dillard signed his name at the bottom of all said answers and "proposals," and that said answer "yes" to question 5 was assented to by said Dillard, and (to the best of said witness' recollection and belief) said answer was read over to said Dillard after the same was written by said witness; that after the said questions and answers, as they appear on the face of said "proposals," were completed, the same were read over to said Dillard, and he affixed his signature, as did also the witness, at the end thereof; that then said witness read over to said Dillard the paper immediately following said questions and answers, marked "Declaration," as set forth above, as part of said "proposals," and that said Dillard approved of and assented to said "declaration;" and the same was also signed by said Dillard, as it appears above on its face, at the end of said "declaration;" that after all this was done, the said papers, signed and executed as

aforesaid, were handed by said witness to said Dillard, who kept them in his possession for several hours; after which the same were returned to the witness by said Dillard, to be completed and sent forward to the defendant or her general agents in this State, Handy and An-
196 drews, to be accepted or approved by said defendant, according to the terms and conditions thereof, as appearing on their face; that said defendant had thereupon accepted said proposals, and had issued the policy herein sued on, and on the condition contained in said policy, that if the proposals, answers, and declarations made by said Dillard, and so returned to said defendant, should be found to be fraudulent or untrue in any respect, or that there was any wilful misrepresentation or concealment in said declaration, &c., then that said policy should be of no effect.

And after the introduction by said defendant of this testimony, or to this effect, the plaintiffs introduced JOHN T. COX as a witness, and offered to prove by him that said Cox was present at the time said question No. 5 was propounded by said Yeiser to said Dillard, and that Dillard did not answer thereto "yes," but answered the same to this effect: "I never refuse to take a drink," or, "I always take my drinks;" and that the answer "yes," was improperly written down by said Yeiser at the time, without the knowledge or consent of said
197 Dillard. To the introduction of which said testimony of said Cox the defendant objected as incompetent and inadmissible under the state of facts above stated in relation to the execution, signature, and delivery of said proposals.

But this exception was overruled, and the court permitted said testimony to go to the jury. To which said ruling of the court and allowing said testimony to go to the jury, the said defendant prays leave to except, and that this exception be signed and sealed by the court before the jury retire; which is accordingly done.

[R. A. HILL, *Judge.* [SEAL.]

Bill of exceptions, No. 2.

Circuit court U. S., southern district of Mississippi, November term, 1872.

Z. F. MAHONE AND W. C. D. MAHONE
vs.
AMERICAN LIFE INS. CO.

Be it remembered that on the trial of this cause the defendant, in order to support the issues on her part, offered as a witness Dr. Alexander, who testified that he was a regular physician and practising his profession in June, 1870, and was then medical examiner for the Conti-
198 nental Insurance Company of New York, and that Dillard, in June, 1870, submitted himself for examination as an applicant for insurance in said company, and was examined by witness; and the defendant then proceeded to ask the said witness what was his opinion, on said examination, as to the said Dillard being a fit subject for insurance, and said witness stated that he pronounced said Dillard as not worthy of insurance; and thereupon the plaintiff asked the said witness whether he made a report in writing to said insurance company of his opinion as aforesaid; to which the witness replied that he did state his opinion to said company in writing; and thereupon the plaintiffs moved to exclude from the jury said opinion of said witness, because the same

was in writing and could not be proved except by production of the writing or accounting for its loss or absence, which motion by said plaintiff was sustained by the court, and said testimony was excluded; to which said ruling said defendants then and there excepted; and thereupon the said defendant further asked said witness whether he was acquainted with the condition and state of health of said Dillard at the time of his examination by witness, in June, 1870; and, if so,
199 what it was, and the nature of his disease or malady at that time, if any, to which question the plaintiffs objected as aforesaid, and the objection was sustained, and said question was not allowed by the court to be answered; to which said ruling said defendant also excepts, and prays the court to sign and seal this his bill of exceptions to each and singular the said rulings of the court as herein above stated before the jury retire from the bar; and which is accordingly done.

R. A. HILL, *Judge.* [SEAL.]

Bill of exceptions, No. 3.

Circuit court of the U. S. for southern district of Mississippi, November term, 1872.

Z. F. MAHONE AND W. D. C. MAHONE
vs.
AMERICAN LIFE INSURANCE COMPANY.

Be it remembered that upon the trial of said cause, witness Yeiser, the district agent of said company, upon cross-examination was asked by plaintiffs' counsel whether or not one Dearing, general travelling
200 agent and supervisor of defendant in the Southern States, some time after the death of said Dillard visited Edwards' Depot for the purpose of examining into the claim of plaintiffs for the payment of said policy; if so, did he make such examination, and did he express an opinion as to whether or not said payment should be made? To the answering of said question the defendant objected, but said objection was overruled by the court; whereupon said witness testified that said Dearing was the general traveling agent and supervisor of defendants for the Southern States, and that Messrs. Handy and Andrews were general agents for the State of Mississippi; that said Dearing did some time after the death of said Dillard visit Edwards' Depot where said Dillard died, for the purpose, as he stated, of examining into the liability of the defendant upon the policy sued on; that witness introduced said Dearing to a number of the leading citizens of the place for the purpose of enabling him to ascertain the facts; that he remained some hours, and before leaving expressed to witness that in his opinion it would be best for the defendant to accept the situation and
201 pay the amount of the policy.

To the action of the court in permitting said answer to be made as testimony to the jury, the defendant's counsel excepted as incompetent, and prays that this the defendant's bill of exceptions may be signed, sealed, and made a part of the record in this cause; which is accordingly done.

R. A. HILL, *Judge.* [SEAL.]

Bill of exceptions, No. 4.

Circuit court of the U. S., southern district of Mississippi, November term, 1872.

Z. F. MAHONE AND W. C. D. MAHONE
vs.
THE AMERICAN LIFE INSURANCE COMPANY.

Be it remembered that upon the trial of this cause it was agreed that all the original papers filed in this cause in the circuit court of Hinds County, from which this cause was removed, and which were competent evidence for either side, and copied in the transcript filed by the defendant, should be read in evidence; that the plaintiffs offered to read in evidence the certificate of A. P. Harris, the medical exami-
202 ner of defendants, who examined said Leonidas Dillard upon his application for the policy sued upon in this cause, which is found upon the transcript filed by defendant, on pages 21 and 22, and is in the following words and figures:

Certificate of the physician who has personally examined the party to be assured, in behalf of the company, and who is required to answer the following questions minutely from a strict examination at the time, and to affix his signature thereto.

(On margin:) For an intelligent decision as to the insurability or otherwise of applicants, the trustees depend much upon the certificates of their medical examiners; they therefore expect that their answer to each question will be full, explicit, and, so far as possible, exact; and no certificate failing to conform substantially to this requirement will be accepted. The name of the person examined should in all cases be inserted, and the certificate dated.

N. B.—This is considered entirely confidential.

Name. Leonidas Dillard; examined the 30 day of August, 1870.

1. State the height, weight, complexion, and general appearance.

5, 8 in.; 115; fair; healthy.

2. What appears to be the general habits of life as to temperance, activity, &c.?

Takes a drink occasionally, and active.

3. Are there any signs of internal or external affection of the head, or of a predisposition to it; or of paralysis, convulsions, or any other disease of the brain or nervous system?

No.

203 4. What is the character of the respiration as to fulness, clearness, strength, ease, and uniformity over both lungs, and freedom from abnormal sounds and from cough and expectoration?

Clear and healthy.

5. What is the character of the heart's action as to clearness, force, regularity, and freedom from unusual sounds?

Regular and healthy.

6. What is the character of the pulse, and its rate per minute?

Regular, and 80.

7. Are there any signs of disease of the stomach, bowels, liver, kidneys, or urinary organs, or of hernia?

No.

8. Are there any physical or other signs of *of* affection of the lungs,

heart or larger blood-vessels, or of any other important part or parts not included in the above questions?

No.

9. Are there any signs of previous disease, or of mechanical injury?

No.

10. Is there any predisposition, either hereditary or acquired, to any local or constitutional disease?

No.

204 11. If a female, is she pregnant? How far gone, and whether first time or otherwise?

12. Opinion on the life? Is it clearly first, second, or third class, and do you advise the risk?

I consider it a first-class risk.

Signature: (Signed) A. P. HARRIS, *M. D.*

To the reading of which the defendant's counsel objected for the reason that said Harris should have been introduced and examined as a witness by plaintiffs. But the court overruled the objection, and permitted said certificate to be read as evidence to the jury. To the overruling of which objection by the court, and the permitting said certificate to be read to the jury as evidence in the cause, the defendant excepts, and prays that this his bill of exceptions may be signed, sealed, and made a part of the record in this cause; which is accordingly done.

R. A. HILL, *Judge.* [SEAL.]

205 *Bill of exceptions, No. 5.*

Circuit court U. S., southern district of Mississippi, November term, 1872.

Z. F. MAHONE AND W. D. C. MAHONE
vs.
AMERICAN LIFE INS. CO.

Be it remembered that on the trial of said cause the said plaintiffs, in order to maintain the issues on their part, offered to read in evidence from the transcript of the record from Hinds circuit court, the following statement of John G. Yeiser, as the same appears on page 23 of said transcript, to wit:

1. When did you last see the person whose life is proposed to be insured?

This day.

2. Are you intimately acquainted with him? If not, have you obtained such information as will enable you to answer the following questions correctly?

I have known him about four years, and think I can answer the questions satisfactorily.

3. Is he in a reputable situation of life, and of temperate habits?

As far as I know.

4. Do you consider his occupation or manner of living injurious to his health?

I do not.

206 5. Do you believe that he is now in good health and has a healthy constitution?

I do.

6. Are you aware of any particular circumstance touching his past

or present health and habits of life which would make it unsafe to insure his life?

I am not.

7. Has his family, to your knowledge, been afflicted with pulmonary complaints, or any other disease that tends to shorten life?

No.

8. Do you consider him in all respects a proper person to be insured, and do you recommend him as such?

I do.

Dated Edwards' Depot, Sept. 1st., 1870.

(Signed) JNO. G. YEISER,
Dist. Agent.

Said Yeiser being the same person who has already been examined and cross-examined as a witness in said cause.

To the reading of which in evidence the defendants objected because—

1. Said statement is not referred to in any of the pleas or pleadings, nor made part thereof; and was not properly part of the record.

207 2. That as to any of the matters stated in said statement said Yeiser should have been examined as a witness, he being in court.

3. Said statement was not offered on the ground of impeaching the credit of said Yeiser, but as evidence generally.

4. The matters therein stated are irrelevant to any of the issues made by the pleadings.

But the objection was overruled, and the said statement was permitted by the court to be read in evidence; to which ruling the defendant excepts, and prays the court to sign and seal this bill of exceptions before the jury retire from the bar; which is accordingly done.

R. A. HILL, *Judge.* [SEAL.]

Bill of exceptions, No. 6.

Circuit court of the United States for the southern district of Mississippi, November term, 1872.

Z. F. MAHONE AND W. C. D. MAHONE
vs.
AMERICAN LIFE INSURANCE COMPANY.

208 Be it remembered that upon the trial of this cause, after the evidence was closed and the argument concluded, and before the retirement of the jury to consider their verdict, the judge, among other things not excepted to, charged the jury as follows: "That if the jury is satisfied from the proof that the defendant issued the policy read in evidence, and upon which this suit is brought, upon the faith of the answer 'yes' to question No. 5 as taken by Yeiser, the defendant's agent, and the 'declaration' read in evidence, yet if the jury believe from the evidence that said Yeiser, agent of the defendant, in taking said proposal and answers did not truly and correctly write down the answer of said Dillard to question No. 5, and that the answer of said Dillard was not 'yes,' but that his answer really given was 'I never refuse to take a drink' or 'I always take my drinks,' then the defendant can claim no benefit of defence in this suit on account of the answer 'yes,' for the reason that the act of the agent Yeiser, at the time, in taking said answer to said question No. 5 was the act of the

defendant, and binding on the defendant, his principal, as much so as if the defendant had been present at the time of taking said answer to question No. 5; and it makes no difference as to defendant's liability upon said policy that the defendant when said policy was issued had no knowledge of the transaction other than that which appeared on the face of said proposals, answer, and declaration; that insurance companies, like all other parties, are bound by the acts of their agents; that that which is done by the agent is to be considered as done by the company, and notice to the agent whilst in the transaction of his *his* agency is notice to the company."

To all of which the defendant excepted, and prayed that this his bill of exception may be signed, sealed, and made a part of the record in this case; which is accordingly done.

R. A. HILL, *Judge.* [SEAL.]

On the 16th day of January, A. D. 1873, the following writ of error bond was filed in this cause in said court, to wit:

Know all men by these presents that we, the American Life Insurance Company, a body-corporate, duly incorporated by charter granted by the State of Pennsylvania, and having its principal office and place of business located in the said State of Pennsylvania, and Joshua J. Richards and Thomas A. Phillips, residents of Madison County, in the State of Mississippi, are held and firmly bound unto Zenora F. Mahone and William C. D. Mahone, her husband, of said last-mentioned State, their certain attorney, executors, administrators, or assigns, in the sum of eleven thousand one hundred and ten dollars, current-money; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, and the successors of said body-corporate, jointly and severally, firmly by these presents, signed by the presidents of said body-corporate and countersigned by the secretary thereof, who have, by due authority of said body-corporate, hereto affixed the common seal of said body-corporate; and the said two other obligors above named have affixed their hands and seals, this thirteenth day of January, in the year of our Lord eighteen hundred and seventy.

Whereas lately at a circuit court of the United States held at the city of Jackson, in and for the southern district of the State of Mississippi, in a suit at law depending in said court between the aforesaid Zenora F. Mahone and William C. D. Mahone, her husband, plaintiffs, and the said American Life Insurance Company, defendant, on the thirtieth day of November, in the year of our Lord eighteen hundred and seventy-two, judgment was rendered in favor of the said plaintiffs against the said defendant for the sum of five thousand five hundred and fifty dollars, with interest thereon at the rate of six per centum per annum from the date of said judgment as aforesaid, and the costs of said suit; and the said American Life Insurance Company having obtained a writ of error to said judgment, and filed a copy thereof in the clerk's office of said court, to reverse the judgment aforesaid, and a citation directed to the said Zenora F. Mahone and William C. D. Mahone, her husband, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said American Life Insurance Company shall prosecute the said writ of error to effect, and answer all costs and damages if said com-

pany fail therein to make her said plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) GEORGE W. HILL, *President.* [SEAL.]
J. J. RICHARDS. [SEAL.]
THO'S A. PHILLIPS. [SEAL.]

Countersigned:

[L. S.] JOHN S. WATSON, *Secretary.*

Approved:

R. A. HILL,
Judge, &c.

STATE OF MISSISSIPPI,
Madison County:

Personally appeared before me, mayor of the city of Canton, and ex-officio justice of the peace in and for said county and State, J. J. Richards and Tho's A. Phillips, who, being duly sworn, each states on oath that he is severally worth the sum of three thousand dollars over and above his liabilities and property exempt and subject to execution.

J. J. RICHARDS.
THO'S A. PHILLIPS.

Sworn to and subscribed before me this Jan'y 13th, 1873.

GEORGE HARVEY,
Mayor and J. P.

213 I have examined the within bond and approve the same, with the sureties, as good and sufficient.

January 14, 1873.

R. A. HILL,
United States District Judge for Mississippi,
Presiding on the trial of said cause.

Filed January 16, 1873.

GEO. T. SWANN, *Clk.*

SOUTHERN DISTRICT OF MISSISSIPPI, *ss:*

I, George T. Swan, clerk of the circuit court of the United States for said district, hereby certify that the above and the preceding annexed 212 pages contain a full, true, and complete transcript of the record of said court, in the cause therein stated, as the same remains in said court, together with a true copy of the writ of error bond filed in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at office, in Jackson, this 16th day of April, A. D. 1873.

[SEAL.] GEO. T. SWANN, *Clerk.*

Clerk's fee for transcript, &c., paid by plaintiff in error April 16, 1873. $46.65.

GEO. T. SWANN, *Clk.*

214 UNITED STATES OF AMERICA:

The President of the United States to the judges of the circuit court of the United States for the southern district of Mississippi, greeting:

Because, in the record and proceedings and also in the rendition of the

judgment of a plea which is in the circuit court before you, between Zenora F. Mahone and William C. D. Mahone, plaintiffs, and the "American Life Insurance Company," defendants, a manifest error hath happened, as it is alleged, to the great damage of said defendant, and we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, you send, distinctly and openly, the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 1st Monday in December next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done in that behalf to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 16th day of January, in the year of our Lord eighteen hundred and seventy-three, and Geo. T. Swann, clerk of the circuit court of the United States for the southern district of Mississippi.

[SEAL.]

GEO. T. SWANN,
Clk Cir. Co. U. S., South. Dist. Miss.

(Indorsed:) 1649. Z. F. & W. C. D. Mahone vs. The "American Life Insurance Company." Writ of error. Filed January 16, 1873. Geo. T. Swann, cl'k.

215 The United States of America, *greeting*, to Zenora F. Mahone and William C. D. Mahone, her husband, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States in and for the southern district of Mississippi, at the city of Jackson, in said State, to a judgment at law in said court, rendered on the thirtieth day of November, in the year 1872, in your favor against the "American Life Insurance Company," for the sum of five thousand five hundred and fifty dollars, with interest from said date at the rate of six per centum per annum, and costs of said suit, in which said writ of error the said American Life Insurance Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why said judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Robert A. Hill, judge of the United States in and for the southern district of Mississippi, and acting herein, and on the trial of the aforesaid cause in said circuit court, as a member of the circuit court in and for the circuit aforesaid, this 14th day of January, in the year of our Lord 1873.

R. A. HILL, *Judge*. [SEAL.]

216 THE UNITED STATES OF AMERICA, *to wit:*

I, George T. Swann, clerk of the circuit court of the United States for the southern district of Mississippi, do hereby certify that on this day appeared before me, Samuel Livingston, and, being duly

sworn, stated on oath that on this 16th day of January, anno Domini eighteen hundred and seventy-three, he, the said Livingston, did deliver to C. E. Hooker, esquire, one of the attorneys of record in said circuit court, for the plaintiffs, Zenora F. Mahone and W'm C. D. Mahone, in the suit mentioned in the within citation, a true copy of the within citation. Witness my hand this 16th day of January, A. D. 1873.

SAMUEL LIVINGSTON.

Sworn to & subscribed before me this 16th January, A. D. 1873.
GEO. T. SWANN, *Clk.*

(Indorsed:) 1649. Circuit court U. S., southern district of Mississippi. American Life Insurance Company, plaintiff in error, vs. Zenora F. Mahone & William C. D. Mahone, defendants in error. Citation in error.

(Indorsement on cover:) No. 448. The American Life Insurance Company, plaintiff in error, vs. Zenora F. and William C. D. Mahone. S. Mississippi C. C. U. S. Filed 9th July, 1873.

Supreme Court of the United States.

No. 165.

AMERICAN LIFE INSURANCE COMPANY,

Plaintiff in Error,

vs.

ZENORA F. MAHONE AND HUSBAND,

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

EDWIN L. STANTON,
Of Counsel.

M'GILL & WITHEROW, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

AMERICAN LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

ZENORAH F. MAHONE, and HUSBAND,
Defendants in Error.

No. 165.

ERROR TO THE CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This is an action brought by defendants in error, plaintiffs below, on a policy of insurance for five thousand dollars, issued on August 30, 1870, by plaintiffs in error, on the life of Leonidas Dillard, the sum insured being payable to Zenorah F. Mahone, sister of the insured. The policy (Record, p. 2) provides that it shall become void if the insured should become so far intemperate as to impair his health. It is also stipulated that if the proposals, answers, and declarations made by the insured, bearing even date with the policy, and on the faith of which the policy was issued, should be found to be fraudulent or untrue in any respect, or if there should be any willful misrepresentation or concealment in said declarations, then the policy should become void.

The fifth question and answer in the proposals for insurance signed by Dillard (Record, p. 8) are as follows:

"5. Is the party temperate and regular in his habits?"
"Yes."

The sixteenth question and answer are as follows:

"16. Is the applicant aware that any untrue or fraudulent answers to the above queries, or any suppression of facts in regard to health, habits, or circumstances, or neglect to pay the premium on or before the day it becomes due, will vitiate the policy and forfeit all payments made thereon?"

"Yes."

The declaration signed by Dillard (Record, p. 9) contains, among others, the following statement: "In the foregoing proposal I have not withheld any material circumstances or information touching the past or present state of the health or habits of life with which the American Life Insurance Company ought to be made acquainted. * * And if at any time hereafter the company shall discover that any fraudulent or untrue allegation be contained herein, or in the proposals, or any material misstatement of facts regarding the condition or health of the party insured, then in any and every such case * * the policy of insurance made on the faith of this declaration and the proposals shall become null, void, and of none effect."

Dillard died on November 4, 1870.

Of the four issues raised by the pleas the following three only concern the questions here raised:

1. To the defense that the policy became void because the answer to question five above given was untrue, the plaintiff below [the defendant in error here] replied that the actual answer made to said question was, "that he always takes his drinks," or to that effect, and that the agent of the company himself wrote down the word "yes." (Record, pp. 6 and 18.)

2. Issue was joined, upon the defense that the policy became void because the insured, after its execution, became so far intemperate as to impair his health. (Record, pp. 2 and 13.)

3. The defense was pleaded that, to the question whether a proposal had been made for insurance of Dillard's life in any insurance office, and, if so, whether the same had been

accepted or declined, Dillard answered, "Insured in Equitable for $5,000;" suppressing the truth that he had previously applied for insurance to either the Equitable or Continental insurance companies, or to both, and that such application had been refused. The plaintiff below replied, denying the alleged suppressions, and averring that at the time of his applications the insured had received no answer to his application to the above-mentioned companies. (Record, p. 75.)

The exceptions taken at the trial were as follows:

1st and 6th. Yeizer, the agent who effected the insurance, testified, that having read to Dillard specifically the fifth question and its affirmative answer, and on the completion of the papers having read to him all the questions, answers, and declarations, Dillard signed the answers, and also the declaration, and then took all these papers for examination and kept them in his possession for several hours, and afterwards returned them to Yeizer to be sent forward to the company as his application for insurance.

The plaintiff below then sought to prove by one John T. Cox, that when question five above mentioned was propounded to Dillard by Yeizer, Dillard did not answer "yes," but answered to this effect, "I never refuse to take a drink," or, "I always take my drinks," and that the answer "yes" was written down by Yeizer without the knowledge or consent of Dillard. This testimony was introduced against the objection of the defendant below, and an exception was taken. (Record, p. 81.)

Afterwards the court charged the jury, in effect, that if they believed that Dillard answered question five in the words, "I never refuse to take a drink," or "I always take my drinks," then the defendant could claim no benefit on account of the answer "yes," written by Yeizer, even though the defendant when the policy was issued had no knowledge of the transaction other than what appeared on the face of the policies. (Record p. 86.)

2d. In behalf of the defendant one Dr. Alexander testified, that being medical examiner of the Continental In-

surance Company in June, 1870, Dillard came before him for examination as an applicant for insurance in that company, and was examined by him. The witness further testified that as the result of such examination he pronounced Dillard unworthy of insurance. Thereupon the witness was asked by the plaintiffs below whether he reported in writing to the company his said opinion, and, upon his answering that he did state his opinion in writing, the court, on motion of the plaintiffs, excluded from the jury his testimony above mentioned. The defendant below objected to this ruling and noted an exception. The same witness was asked by the defendant below whether he knew Dillard's state of health at the time of his examination in June, 1870, and if so, what it was and the nature of his malady, if any. To this question plaintiffs below objected, and the objection was sustained, and the defendant below excepted. (Record, p. 82.)

3d. Yeizer, defendants' agent, had, on his examination-in-chief, testified as above stated concerning the occurrences connected with Dillard's application for insurance. On his cross-examination defendant was allowed to elicit from him that one Dearing, general traveling agent and supervisor of the defendant in the Southern States, some time after Dillard's death visited Edward's Depot for the purpose, as he stated, of examining into the defendant's liability on the policy sued on, and remained there some hours, and before leaving expressed to the witness the opinion that it would be best for the defendant to accept the situation, and pay the policy. The admission of this testimony was objected to by the defendant below, and the objection was overruled, and an exception noted. (Record, p. 83.)

4th and 5th. It was stipulated (p. 84) that all the original papers filed in the cause in the Circuit Court of Hinds County, where the action was originally brought, and which were competent evidence for either side, and copied in the transcript filed, should be read in evidence. Against the objection of the defendant below, the plaintiff below

was allowed

offered to read in evidence the certificate of Dr. Harris, medical examiner of the company, and also a written statement of Yeizer, agent of the company, both made at the time of Dillard's application for insurance. (Record, pp. 84, 85.) These two papers were appended to the proposals for insurance and declaration, and the proposals and declaration by name are made part of the first and third pleas. In no other way were Dr. Harris's certificate and Yeizer's statement filed in the cause or made part of the record. (Record, pp. 6, 8.)

Assignment of Errors.

The errors relied upon by the plaintiff in error are:

1. The ruling which admitted the testimony of the witness, Cox, to contradict by parol the written answer of Dillard to question 5 in the declaration and proposals made by the latter to the insurance company; said answer, as written, being a warranty, being affirmed by the subsequent answer of Dillard, also written, to question 16, and being also ratified and repeated by Dillard's delivery of the papers to the company after they had been handed to him, and had been kept by him several hours. (First bill of exceptions, Record, pp. 79, 82.)

2. The rulings which excluded the testimony of the witness, Dr. Alexander, as to his finding, on examination of Dillard in June, 1870, that the latter was not a fit subject for insurance, and as to the latter's state of health, and the nature of his disease or malady at said period. (Second bill of exceptions, Record, pp. 82, 83.)

3. The ruling which admitted, on plaintiff's cross-examination of Yeizer, the testimony of that witness as to certain opinions expressed by one Dearing, as to the expediency of payment by defendant of the policy now in suit. (Third bill of exceptions, Record, p. 83.)

4. The ruling which permitted plaintiff to read in evidence the certificate of Harris, the medical examiner who examined Dillard upon his application for the policy. (Fourth bill of exceptions, Record, p. 84.)

5. The ruling which permitted plaintiff to read in evidence the statement of Yeizer as to the health and insurable character of Dillard. (Fifth bill of exceptions, Record, p. 85.)

6. The instructions of the court to the jury, as follows: "That if they are satisfied from the proof that the defendant issued the policy read in evidence, and on which this suit is brought, upon the faith of the answer 'Yes' to question 5, as taken by Yeizer, defendant's agent, and the declaration read in evidence, yet, if the jury believe from the evidence that said Yeizer, agent for defendant, in taking said proposal and answers, did not truly and correctly write down the answer of said Dillard to question 5, and that the answer of said Dillard was not 'Yes,' but that his answer really given was, 'I never refuse to take a drink,' or 'I always take my drinks;' then the defendant can claim no benefit of defense in this suit on account of the answer 'Yes,' for the reason that the act of the agent, Yeizer, at the time of taking said answer to said question 5, was the act of the defendant, and binding on the defendant, his principal, as much so as if the defendant had been present at the time of taking said answer to question 5; and it makes no difference, as to defendant's liability upon said policy, that the defendant, when said policy was issued, had no knowledge of the transactions other than that which appeared on the face of said proposals, answer, and declaration; that insurance companies, like all other parties, are bound by the acts of their agents; that that which is done by the agent is to be considered as done by the company; and notice to the agent, whilst in the transaction of his agency, is notice to the company." (Sixth bill of exceptions, Record, pp. 86, 87.)

Argument.

I.

The admission of the testimony of Cox as to what was said by Dillard in response to question 5, and the instruc-

tion of the court to the jury as to the effect of belief by the jury in the truth of such testimony, may be considered together.

The pleadings admit that Dillard, when he applied for insurance, was intemperate in his habits in the use of intoxicating drinks, and that an untrue answer by him touching this matter would invalidate the policy. The question at issue is, whether the written answer is his.

Yeizer wrote "Yes," to question 5, as *his* understanding of Dillard's words, and afterwards twice read it to him. By his response to subsequent inquiries, by the statements in his declaration, and by affirmance of the recorded response to question 5, after examination of the papers, Dillard made the written answer "Yes," his own. Nor is that answer necessarily inconsistent with the words alleged to have been used by Dillard when the question was first propounded. Yeizer interpreted the words as an affirmative answer to the question. Dillard, by his acts, approved, adopted, and renewed that interpretation.

The case thus differs from that of Insurance Company *v.* Wilkinson, 13 Wall., 222. In the latter case the application contained a question concerning the age of the mother of the insured at her death, and the cause of her death. The written answer represented her age as forty years and the cause of her death as fever. It was proved that the agent who took down the answers of the insured and his wife was told by both that they knew nothing of the cause of the mother's death, or of her age at the time; that the wife was too young to know anything about it, and that the husband never knew her; that when the agent was taking the answers of the applicant and his wife, an old woman was present who said she had knowledge on the subject, and the agent questioned her for himself, and from what she told him filled in the answer without its truth being affirmed or assented to by the plaintiff or the wife. The court below thereupon charged the jury that, if the applicant did not know at what age her mother died, and declined to state it, and her age was inserted by the agent

upon statements made by others in answer to inquiries he made of them, and upon the strength of his own judgment based upon information thus obtained, it was no defense to the action to show that the agent was mistaken. That ruling was sustained by this court. The reasoning and the decision of this court is that the parol testimony in the case made it clear beyond a question that the party did not intend to make the representation when he signed the paper, and did not know he was doing so, and in fact had refused to make any statement on the subject; and that the agent for the company knowing that the party was wholly ignorant of this particular subject of inquiry, and would make no statement about it, nevertheless wrote the representation to suit himself. Such representation was not the statement of the insured, and the defendant company through its agent knew it was not when the contract was made, but this representation was made by the company through its agent, who procured the insured signature thereto. Upon these facts this court applies the principle that where one party has by his representation induced the other party to give him an advantage which it would be against equity and good conscience for him to assert, he cannot in a court of justice be permitted to avail himself of the advantage. The court therefore held that the writing in question not being the instrument of the party whose name is signed to it, but being procured under such circumstances by the other side, the latter party is estopped from using it or relying on its contents.

In the case at bar unlike that of Insurance Company *v.* Wilkinson:

First. The insured was not ignorant upon the subject of inquiry, and did not refuse to answer, but gave an ambiguous answer, and did not dissent from the interpretation put upon it by the company's agent.

Secondly. He adopted that interpretation of the written answer by response to question sixteen, and again adopted it in his declaration.

Thirdly. After deliberate review and examination of the

papers, he again approved, adopted, and renewed the writted answer by returning the papers to the agent and applying for the insurance upon them.

Fourthly. In these last proceedings of the insured, by which he was bound, and without which what previously occurred was merely preliminary and ineffectual, it is conceded that the company's agent took no part. They were solely and deliberately the act of the insured.

Therefore, there exists in the case at bar not one of the facts which in the case of Insurance Company *v.* Wilkinson opened the door to parol proof to excuse the insured from the effect of untruth in the written answer. On the contrary, the facts here exclude parol testimony. The insured is bound by the untruth of his own written answer.

Liberty Hall Association, 7 Gray, 261.
Smith *v.* Cash Mut. Ins. Co., 24 Penn., 320.
Vose *v.* Eagle Life and Health Ins. Co., 6 Cush., 42.
Dewees *v.* Manhattan Ins. Co., 35 N. J., 366.

The charge of the court below added to the error of admitting this testimony of Cox. The court wholly excluded from consideration subsequent acts of Dillard, and forbade the jury to find that Dillard adopted the answer. The instruction assumed also that if the insured originally responded in the words mentioned by Cox, he intended thereby to give an answer contradictory to that which was written by Yeizer. In effect the jury were instructed, as matter of law, that by such words, if he used them, the insured intended to say that he was intemperate and irregular in his habits. But even if the testimony of Cox were admissible, the jury ought to have been permitted to consider Dillard's subsequent proceedings, and also to come to their own conclusion concerning the intention of the insured, as evidenced by his language and conduct.

The law of Mississippi prohibits the court from instructing the jury upon the weight of evidence, thus: "No judge in any cause shall charge the jury as to weight of evidence," (Rev. Code Mississippi, 1871, § 643;) and it is

the settled rule of practice in Mississippi, that it is error in charging the jury to assume facts stated in the instruction. (35 Miss., 166, 171; 37 *Ib.*, 471, 476; 40 *Ib.*, 240, 247.) And this principle is sanctioned by this court in 11 Wallace, 391, 394.

And these rules are adopted as rules of practice in the courts of the United States by act of Congress, June 1, 1872. (Statutes at Large, vol. 17, p. 196, § 5.)

II.

The testimony of Dr. Alexander, medical examiner for the Continental Insurance Company, that he examined Dillard as a candidate for insurance in that company, and pronounced him unworthy, was excluded from evidence because Dr. Alexander had made a written report to his company. (Record, p. 82.) But the testimony sought to be elicited in behalf of the defendant below was not the contents of Dr. Alexander's report, but his act as an officer of the insurance company in rejecting Dillard as an applicant for insurance. And this testimony went to one of the issues in the case; for it was conceded by the pleadings that if Dillard had been rejected as an applicant for insurance in the Equitable Insurance Company before August 30, 1870, he suppressed, in his application to the defendant below, a material fact, and the policy thereby became void.

Dr. Alexander also was prevented from testifying as to the state of Dillard's health at the time of that examination. (Record, p. 83.) This testimony was material, as bearing upon the nature and effect of the communication made by Dillard in the language used, according to the testimony of Cox, in answering question five. Moreover, the evidence could not be fairly excluded if the opinion and statement of Harris and Yeizer as to Dillard's physical condition offered in behalf of the plaintiffs, were properly admitted in evidence. On the other hand, Dr. Alexander's testimony was free from objections to which the other was subject.

III.

The certificate of Dr. Harris and the statement of Yeizer were not properly admitted in evidence unless the agreement above mentioned covers them. (Rec. p. 84.)

They do not come within the terms of the stipulation:—

1. Because they were not properly part of the record of the cause.

The proposals and declarations were incorporated into the pleas by reference to them under that name, and they were set forth in full as exhibits to the pleas. But the certificate of Dr. Harris and the statement of Yeizer were not part of said proposals and declarations.

2. Because they were not under oath, and were not admissions by which the company was bound.

3. Because they were not that competent evidence to which the agreement refers.

IV.

Against defendant's objection Yeizer, an agent of the company, who had, in behalf of the defendant, testified only to the execution by Dillard of the proposals and declarations at the time of the latter's application for insurance, was asked, on cross-examination, whether one Dearing, traveling agent and supervisor for defendant in the southern States, visited Edwards' depot some time after Dillard's death, for the purpose of examining into the claim of plaintiff for the payment of said policy, and whether Dillard made such examination, and expressed an opinion as to whether or not said payment should be made. And also against defendant's objection Yeizer, in answer to this question, was allowed to testify that Dearing, holding the position just mentioned, did visit Edwards' depot where Dillard died, for the purpose, as Dearing stated, of examining into defendant's liability upon the policy; that he remained some hours, and before leaving expressed to the witness the opinion that it would be best for defendant to accept the situation and pay the amount of the policy. The

admission of this testimony was clearly erroneous. The declarations or admissions of an agent, made in the course of a given transaction pertaining to his agency, are admissions against his principal; but the mere opinion of an agent, based upon past occurrences, is not an admission to be used against his principal, because it is no part of the *res gestæ*. (Cortland County *v.* Herkimer County, 44 N. Y., 22; Morrell *v.* Dixfield, 30 Me., 157; Kemp. *v.* Balt. Ins. Co., 2 Gill & J., 108; Mich. Cent. R. R. *v.* Gonga, 55 Ill., 503; Am. Express Co. *v.* Gilbert, 57 Ill., 468; Hannay *v.* Stewart, 6 Watts, 489.)

In the case of the Northwestern Packet Co. *v.* Clough, decided at the present term of this Court, judgment below was reversed, and a new trial ordered, for the single error of admitting the declarations of an agent, consisting of a narrative of a past occurrence of which the agent had been an eye-witness. In the case at bar, the facts upon which the liability of the company depends all happened before the declarations in question were made by Dearing. Nor were his declaratians connected with the statement of any material fact, present or past. It was a grave error to permit the jury to be influenced by the expressions which Dearing is said to have used.

EDWIN L. STANTON,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

No. 165.

The American Life Insurance Company,

PLAINTIFF IN ERROR

vs.

Zenora F., and Wm. C. D. Mahone,

DEFENDANTS IN ERROR

In Error to the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF OF WM. T. WITHERS,

FOR DEFENDANTS IN ERROR.

Transylvania Printing and Publishing Co., Lexington, Ky.

Supreme Court of the United States.

No. 165.

The American Life Insurance Company,
PLAINTIFF IN ERROR,

vs.

Zenora F., and Wm. C. D. Mahone,
DEFENDANTS IN ERROR.

In Error to the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF OF WM. T. WITHERS,

FOR DEFENDANTS IN ERROR.

The Court, from an examination of the complex and voluminous pleadings contained in the record, cannot fail to discover that this is but another one of the cases, now unfortunately too common, in which an Insurance Company seeks, by baffling defenses, to annoy and worry a needy policy-holder into a compromise, and acceptance of much less than the amount stipulated to be paid by the terms of the policy.

The suit on the policy was brought in the Circuit Court of Hinds county, Mississippi, and a verdict and judgment was obtained for the full amount of the policy. A new trial was granted, and the case was then, on application of Plaintiff in Error, removed to the Circuit Court of the United States for the Southern District of Mississippi, in which a verdict and judgment were likewise obtained against the Company.

It will be noted that two defences were relied on in the State Court, which were abandoned in the United States Court by the

formal withdrawal of the 3d and 4th pleas (see pages 72 and 73 of printed record). After three days spent by Plaintiffs in Error, in re-modelling the pleadings in the United States Court, two issues were finally reached and the case put to the jury, and on the sixth day a verdict and judgment was again obtained against the Company. It is manifest from the record that, from the beginning to the end of the trial below, all manner of baffling defenses were made and frivolous exceptions were taken, in pursuance of the fixed purpose of the Company to delay and worry the Defendant in Error, who is a woman in destitute circumstances, into a compromise, and thus deprive her of the provisions her deceased brother hoped to make for her in case of his decease. It is unnecessary to consider, in detail, the numerous pleas, rejoinders, demurrers and exceptions to the evidence, as this Court will only consider the matters presented in the six Bills of Exception signed by the Presiding Judge below. These we propose to briefly consider seriatim.

BILL OF EXCEPTIONS.—No. 1.

The only question presented for the decision of the Court by the first Bill of Exceptions is: Can the answer to a question, as written down by the Agent of the Company, when he took the application for insurance, and which is signed by the applicant, be proved by the evidence of parties who were present, to be *not* the answer given by the applicant for insurance. In other words, if the Agent of the Company, without the knowledge or consent of the applicant for insurance, of his own motion, writes down in the blank furnished by the Company, an answer entirely different from the answer actually given, can this fact be established by the testimony of others? I am saved the necessity of arguing this proposition at length, for this Court has decided that oral testimony is admissible in just such a case.

Insurance Company *v.* Wilkinson, 13th, Wallace, 222.

Justice Miller, delivering the opinion of the Court, says (page 236):

"The modern decisions fully sustain this proposition, and they seem to us founded in reason and justice, and meet our entire approval. This principle does not admit oral testimony to vary or contradict that which is in the writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it."

See, also, Miller *v.* the Mutual Benefit Life Insurance Company, decided by the Supreme Court of Iowa, in April, 1871, reported in, vol. 4, Law Times Reports, page 218.

Question No. 5. is: "Is the party regular and temperate in his habits?" To this question Yeiser, the Agent of the Company wrote down the answer "Yes." John T. Cox was introduced as a witness, and proved that he was present at the time said question was propounded by Yeiser to Dillard, and that Dillard did not answer "Yes," but answered to this effect: "I never refuse to take a drink," or "I always take my drinks," and that the answer "Yes" was improperly written down by said Yeiser at the time without the knowledge or consent of said Dillard (See page 82 of printed record). Plaintiff in Error objected to the introduction of this testimony. The objection was overruled, and he tendered his first Bill of Exceptions.

It is clear that this falls strictly within the rule laid down in the case cited above from 13th Wallace. Hence, there was no error in the ruling of the Court below on this point.

BILL OF EXCEPTIONS No. 2.

Two points are presented in the second Bill of Exceptions. The first is, was it competent for Plaintiff in Error to prove by a physician who had *previously* examined Dillard *as Medical Examiner*

for another Life Insurance Company, the contents of his written report of his examination to that Company, without the production of his written report, or accounting for its loss or absence. That the evidence offered was not only incompetent, but also irrelevant under the state of pleadings, is so plain that we will not take up the time of the Court in arguing this point.

The witness was also asked to state the condition and state of Dillard's health at the time he examined him in June, 1870, and if he had any disease or malady at that time This question was objected to by Defendants in Error and the objection was sustained by the court below. The ruling of the court below was clearly right for two reasons:

1st. There was no issue at all in the case as to the general health of Dillard, or that he was afflicted with any disease or malady. The only issues were, that he had falsely and fraudulently answered "yes" to Question No. 5, which was, "Is the party temperate and regular in his habits?"; and had also falsely and fraudulently answered Question No. 15, which was in reference to his having made a proposal for insuring his life in any Company, and if insured, in what Company and for what amount. The good or bad health of Dillard had not been put in issue, and on this ground the objection was properly sustained.

2d. The inquiry had reference to the state of health at a period months *anterior* to the application made for the insurance with Plaintiffs in Error, and hence it was irrelevant and incompetent to prove applicant's state of health in June, 1870. Moreover, it was addressed the Medical Examiner of another Life Insurance Company, who had made a report of his opinion in writing, and the written report was not produced, nor its non-production accounted for, at or before the time of asking the question.

BILL OF EXCEPTIONS No. 3.

The only point presented in this Bill of Exceptions is that Yeiser, the local agent, was permitted on cross examination to state

that one Deering was the General Traveling Agent and Supervisor for the Southern States of Plaintiffs in Error, and visited Edwards Depot, where Dillard died, for the purpose of examining into their liability upon the policy sued on; and after making the investiga-

The foregoing is in reply to the brief of the plaintiff in error, in which the exception is treated precisely as if the questions objected to had been asked in the direct examination of a witness for the plaintiff below, whereas they were asked upon the cross-examination of a witness for the defendant. This makes an entirely different case. Any question is proper on cross-examination which tends to test the correctness of the witness' testimony in chief. And to sustain this exception the plaintiff in error must show by the record, not that the testimony was not competent to sustain the plaintiff's action, but that it was not proper to test the correctness of the testimony in chief. On this point the exception contains absolutely nothing, and the presumption is that the judge who tried the case was correct in allowing the question to be asked.

The Bills of Exception 4 and 5, present precisely the same legal questions. They are based on Defendants in Error being permitted by the Court to read to the jury from the transcript of the record sent from the State Court to the United States Court, the certificate of the Company's Medical Examiner, and the answe

for another Life Insurance Company, the contents of his written report of his examination to that Company, without the production of his wr[illegible] That[illegible] the evid[illegible] under th[illegible] the time[illegible]

The [illegible] Dillard[illegible] if he h[illegible] objecte[illegible] ed by [illegible] right f[illegible]

1st. [illegible] health[illegible] ady. [illegible] answe[illegible] perat[illegible] ulent[illegible] havin[illegible] if ins[illegible] bad [illegible] grou[illegible]

2. [illegible] mon[illegible] Pla[illegible] pro[illegible]

was addressed the Medical Examiner of another Life Insurance Company, who had made a report of his opinion in writing, and the written report was not produced, nor its non-production accounted for, at or before the time of asking the question.

BILL OF EXCEPTIONS No. 3.

The only point presented in this Bill of Exceptions is that Yeiser, the local agent, was permitted on cross examination to state

that one Deering was the General Traveling Agent and Supervisor for the Southern States of Plaintiffs in Error, and visited Edwards Depot, where Dillard died, for the purpose of examining into their liability upon the policy sued on; and after making the investigation said to witness that in his opinion it would be best for the Defendant to accept the situation, and pay the amount of the policy.

As Deering was *the General Traveling Agent and Supervisor of Plaintiffs in Error, for the entire Southern States*, and visited the place where Dillard died, for the express purpose of examining into all the circumstances, so as to ascertain if his principal was liable on the policy, surely it was no error to permit the admissions he made at the time on the subject to be proven. He was an agent, clothed with full powers to make the investigation and arrive at a conclusion. This was within the scope of his authority. The admissions of an individual are certainly competent evidence against him. A corporation can only make admissions through its officers and agents, and when so made they fall within the general rule.

Besides the statement of Deering, as proved by the local agent, Yeiser, was so worded as not to admit the *actual liability* of Plaintiffs in Error, but was only an expression of opinion that it would be best to accept the situation and pay the amount of the policy. In the form in which the admission was proven, it could not and did not cut any important figure in the case, or materially effect the result, and hence, even if improperly admitted, it is not sufficient ground for reversal.

Bills of Exception Nos. 4 and 5.

The Bills of Exception 4 and 5, present precisely the same legal questions. They are based on Defendants in Error being permitted by the Court to read to the jury from the transcript of the record sent from the State Court to the United States Court, the certificate of the Company's Medical Examiner, and the answer

of John G. Yeiser, the District Agent, to the questions contained in the printed blanks furnished by the Company to their agents and Medical Examiners, and which they were required to answer.

These Bills of Exception show the character of the defence made in the Court below.

In the first place it was expressly agreed in open court, "that all the original papers filed in this cause in the Circuit Court of Hinds county, from which this cause was removed, and which were competent evidence for either side, and copied in the transcript filed by defendant (below) should be read in evidence." See Record, page 84.

The originals of the two papers were filed by *Plaintiffs in Error themselves* in the State Court as Exhibit No. 1 to their first and third pleas (see pages 8, 10 and 11 of Record). Not only was this done, but before Plaintiffs in Error would go into the trial in the State Court, they required that the Plaintiff below should admit that they were the originals, and attached them as Exhibit A to the admission. (See pages 22, 25 and 26 of Record.)

It certainly came with bad grace from Plaintiffs in Error to object to the reading of the papers they themselves filed in the cause and had copied into the transcript sent up from the State Court to the United States Court. Besides it was agreed before going into the trial in the United States Court that these very papers might be read as evidence by either side. The Plaintiff in Error on the trial below read only part of the Exhibit filed by them with their first plea (the third plea having been withdrawn by them), and Defendants in Error insisted that the whole of the Exhibit should be read. Plaintiffs in Error declining to read the whole of the Exhibit, the Court below permitted Defendants in Error to read it to the jury, which was excepted to, and hence the 4th and 5th Bills of Exceptions.

That the Court below did not err in permitting the whole of the Exhibit to be read, under the circumstances disclosed in the Re-

cord, is too plain to admit of a gument. The objection and Bills of Exception are the strongest possible evidence of the frivolous and baffling nature of the defence.

BILL OF EXCEPTIONS No. 6.

This Bill of Exceptions is to part of the charge given by the Judge to the jury. The charge excepted to is as follows (See pages 86 and 87 of Record): "That if the jury is satisfied from the proof that the Defendant issued the Policy read in evidence, and upon which this suit is brought, upon the faith of the answer 'yes,' to Question No. 5, as taken by Yeiser, the Defendant's Agent, and the 'declaration' read in evidence: yet if the jury believe from the evidence that said Yeiser, agent of the Defendant, in taking said proposal and answers did not truly and correctly write down the answer of said Dillard to Question No. 5, and that the answer of said Dillard was not 'yes,' but that his answer really given was, 'I never refuse to take a drink,' or, 'I always take my drinks,' then the Defendant can claim no benefit of defence in this suit on account of the answer 'yes,' for the reason that the act of the agent Yeiser at the time in tak ng said answer to said Question No. 5 was the act of the Defendant, and binding on Defendant, as much so as if the Defendant had been present at the time of taking said answer to Question No. 5; and it makes no difference as to Defendant's liability upon said Policy, that the Defendant when said Policy was issued had no knowledge of the transaction other than that which appeared on the face of said proposal, answer and declaration; that Insurance Companies, like other parties, are bound by the acts of their agents; that that which is done by the agent is to be considered as done by the Company, and notice to the agent, whilst in the transaction of his agency, is notice to the Company."

This charge lays down the law as expounded by this Court in the case of Insurance Company *v.* Wilkinson 13, Wallace 222, and

is fully sustained by numerous well considered cases decided by other courts.

Plum *v.* Cattaragus Insurance Company 18 New York 392.

Rowley *v.* Empire Insurance Company 36 Id. 550.

Woodbury Savings Bank *v.* Charter Oak Insurance Company 31 Connecticut 526.

Combs *v.* Hannibal Savings and Insurance Company 43 Missouri 148.

Bebbe *v.* Hartford Insurance Company 25 Connecticut 51.

The Lycoming Insurance Company *v.* Shollenberger 8 Wright 259.

Beal *v.* the Park Insurance Company 16 Wisconsin 241.

Davenport *v.* Peoria Insurance Company 17 Iowa 276.

Savings Bank *v.* Charter Oak Insurance Company 31 Connecticut 517.

Harwitz *v.* Equitable Insurance Company 40 Missouri 557.

Ayers *v.* Hartford Insurance Company 17 Iowa 176.

I would call the special attention of the Court to the case of Miller *v.* the Mutual Benefit Life Insurance Company decided by the Supreme Court of Iowa, in April, 1871, and published in the American Law Times Reports, vol. 4, page 218. It is in many particulars similar to the case at bar, and involves the very questions embraced in the 1st and 6th Bills of Exception. Chief Justice Day, who delivered the opinion of the Court, after reviewing the authoritates closes this branch of the case with the following pertinent and forcible remarks:

"Just principles of public policy require that these companies should be held to a strict degree of responsibility for the acts of their agents. They will thus be led to the exercise of greater circumspection in the selection of agents, and the masses will, in part at least, be relieved from an annoying importunity, which often leads them to procure policies without the full concurrence of their judgments, and in opposition to their best interests. The business of insurance is rapidly increasing in magnitude and im-

portance; and it is as essential to the companies themselves as to the assured, that the rules of law declared applicable to them should be based upon just and equitable principles, and administered in a manner in harmony with the doctrines of an enlightened jurisprudence. It is quite time that the technical constructions which have pertained, with reference to contracts of this kind, blocking the pathway to justice, and leading to decisions opposed to the general sense of mankind, should be abandonded, and that these corporations, grown opulent from the scanty savings of the indignant, should be held to the same measure of responsibility as is exacted of individuals."

With this brief review of the points presented by the six Bills of Exception the case is submitted in the confident expectation that the judgment of the Court below will be affirmed.

Believing that the defense is frivolous and the writ of error prosecuted merely for delay, we ask under the 23d rule of this Court ten per centum damages on the amount of the judgment.

~~WM. T. WITHERS.~~
~~For Defendants in Error.~~

Carlisle & McPherson
Jno Dufton

Supreme Court of the United States.

OCTOBER TERM, 1874.

AM. LIFE INS. CO., P. E.,
vs.
MAHONE.
No. 165.

BRIEF FOR DEFENDANT IN ERROR.

Action on policy on life of Dillard. Defence: 1st. Policy obtained by false and fraudulent representation. 2d. Forfeited.

FIRST ERROR ASSIGNED.

1*st Exception.* Rec. p. 79–82,

Defendant offers evidence to prove written answer of Dillard, and alleged to be false. Plaintiff offers evidence that such answer was not given by Dillard, but a different and correct answer was given, and Dillard did not know what was written. Objected to as inadmissible under state of facts alleged in the exception.

Admissible.—*First.* Because it is competent to show that the answer written down was not Dillard's answer. 13 Wallace, 222. *Second.* Because it was not for the judge to assume that the defendant had proved any facts, and so to exclude testimony inconsistent therewith.

SECOND ERROR ASSIGNED.

2*d Exception.* Rec., p. 82.

Defendant offers to prove a physician's opinion of Dillard as nor an insurable case, say three months before policy

issued. Plaintiff objects because opinion was in writing, and writing not produced.

The only issue to which such proof was applicable was misrepresentation in answer to question whether Dillard had applied for insurance to the Continental, and if so whether accepted or delivered.

As to Alexander's opinion; that if admissible, might be proved by himself. But as to his report to the company, that being in writing, the writing itself was the best evidence, and should have been produced or its absence accounted for.

But his opinion was clearly evidence of nothing. His report itself scarcely evidence. Question is: Did the Continental reject the application; is it any proof of this that Alexander thought the Continental ought to do so?

Again; defendant offered Alexander to prove Dillard's condition of health in June. Court ruled it out. Question, whether the evidence comes near enough in point of time, is a question for the court. And (2) no issue as to Dillard's health in June.

THIRD ERROR ASSIGNED.

3d *Exception.* Rec., p. 83.

Allowing questions by plaintiff on cross-examination. Question proper if relevant to anything inquired of in direct examination If not relevant, exception ought to show it; shows nothing whatever on the subject; and so does not show affirmatively that the questions were inadmissible.

They were excepted to simply as incompetent, and the argument here is, and it is presumed there was, that they called for testimony not competent to sustain the action; That is no good objection.

Fourth and Fifth Errors Assigned.

4th and 5th Exceptions. Rec., pp. 84, 85.

Plaintiff was allowed to read statements of Harris and Yeiser, under stipulation to read any original paper filed in the cause, and copied in the transcript, and competent evidence for either side; that these were original papers filed in the cause and copied in the transcript, appears at page 22 of record. They were competent to prove that Dillard did not deceive the defendant, and that the defendant was not deceived, as alleged in first plea.

Sixth Error Assigned.

6th Exception. Rec., p. 86, 87.

Charge excepted to. The charge as reported is in itself correct; it is a correct ruling upon the evidence stated in the exception. But it is said it applied to other evidence not set forth in the exception, but set forth in other exceptions.

But "each bill of exception must be considered as presenting a distinct and substantial case, and it is on the evidence stated in itself alone that the court is to decide, we cannot go beyond it and collect other facts which must have been in the mind of the parts."

Dunbar *vs.* Monroe, 7 Cranch, 270.

Conclusion.

This case has been tried twice. Every opportunity has been allowed the defendant to present their case, even to the extent of allowing a new plea to be filed the day before the jury was sworn. Rec., p. 76, 78. If there be any error whatever in the rulings of the circuit court, which we think there is not, it is too trival to deserve attention, and we submit the judgment should be affirmed, with costs and damages.

CARLISLE & McPHERSON,
For Deft. in Error.

Supreme Court of the United States.

No. ~~448~~ 165

AMERICAN LIFE INSURANCE COMPANY, Plaintiff in Error,

vs.

ZENORA F. MAHONE and HUSBAND, Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

M'GILL & WITHEROW, PRINTERS, WASHINGTON, D. C.

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Supreme Court of the United States.

AMERICAN LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

ZENORA F. MAHONE AND HUSBAND,
Defendants in Error.

No. 448.

ERROR TO CIRCUIT COURT FOR SOUTHERN DISTRICT OF MISSISSIPPI.

BRIEF FOR PLAINTIFF IN ERROR.

I.

ABSTRACT OF RECORD.

Debt by defendants in error on policy of insurance by plaintiff in error, for $5,000, on the life of Leonidas Dillard, issued to him August 30, 1870, but to be paid to Mrs. Mahone, his sister, within sixty days after notice of his death, with *proviso*, amongst other things, that it should be void if he shall become so far intemperate as to impair his health.

The policy incorporates in it a "declaration and agreement, that if the proposals, answers, and declarations made by said Dillard, dated 30 August, 1870, *on the faith of which this policy was issued*, shall be found to be fraudulent or untrue in any respect, or that there is any willful misrepresentation or concealment in said declaration," &c., then the policy shall be void.

The declaration avers the death of Dillard on November

4, 1870, notice thereof, and non-payment of the amount due.

After various amendments and withdrawals of pleas, &c., which make some confusion in the record, the cause was tried on the following pleas and issues thereon, all others being withdrawn:

1*st Plea.*—That the policy was void, because Dillard falsely answered question 5 in the declaration and proposals made by him, and on the faith of which it was issued—that he was temperate in his habits in the use of intoxicating drinks.

Replication.—Denies that Dillard made the answer "Yes," as written in the proposals, to the question as to his habits of temperance, but that he really answered said question 5, in substance, that "*he always* takes his drinks," &c.

2*d Plea.*—That the policy became void, because Dillard, after its execution, became "so far intemperate as to impair his health," in violation of one of the conditions expressed in the proposals on which it was issued.

Replication.—General traverse and issue.

5*th Plea.*—That the policy was void, because it was issued on the false statement of Dillard, in answer to the 15th question in the proposals, that he was then insured in the Equitable Assurance Society, of New York, for $5,000, when in fact he was not then insured in that or any other insurance company.

Replication.—Denies the alleged false representation, and alleges that Dillard did not answer said question 15, that he *was then* insured in said Equitable Society, but that he *had been* insured in said society for $5,000, which fact was known to Yeizer, defendant's agent, who took the policy here sued on, who knew at the time of the proposals that the policy of Dillard in said Equitable Society had been granted, but was forfeited for non-payment of premium, and, with this knowledge, that Yeizer wrote the answer 15, as stated.

On this issue was joined.

6*th Plea.*—That the policy was issued on the faith of a

declaration and warranty in writing, made by Dillard in his proposals for insurance, in answer to a question in said proposals contained—"Has a proposal been made for insuring said Dillard's life in this or any other office, and, if so, whether accepted or declined?"—to which Dillard answered, "Insured in Equitable for $5,000," intending thereby to answer said question in full, by which answer he fraudulently suppressed the fact, which is averred to be true, that he had, before the time of said answer and proposals, made application for insurance to the Equitable Life Assurance Company of New York, or to the Continental Life Insurance Company, or to both of said companies, and that said application had been refused by either of said companies; by which said fraudulent suppression the said policy sued on became void.

Replication.—Denies the alleged fraudulent suppression of his application to and refusal by either of said companies; and avers that on the 30 August, 1870, at the time of his application to the defendant in this case for insurance, he had received no answer to his applications to said companies.

On this issue was joined.

The *policy sued on* will be found on pp. 2 and 3 of Transcript.

The proposals and "declaration" attached will be found on pp. 8 and 9 of the Transcript.

Verdict and judgment for the plaintiffs on the policy.

II.

Exceptions Taken by Defendant on the Trial.

First Exception.

The defendant read in evidence question No. 5, referred to in the first plea in the proposals for insurance, "Is the party temperate and regular in his habits," and the answer "Yes," of Dillard thereto; also question 16, "Is the applicant aware that any untrue or fraudulent answers to the above queries, or any suppression of facts in regard to health, habit or circumstances," * * * "will vitiate

the policy," &c., and the answer thereto, "Yes;" and then introduced Yeizer as a witness who testified that, as local agent of defendant, he took said "proposals" from Dillard, who signed his name at the bottom of all said answers, and that Dillard assented to said answer, "Yes" to question 5, which was, to the best of witness' recollection and belief, read over by witness to him after the answer was written by witness; that after said questions and answers were completed, as they appear on the face of said "proposals," the same were read over to Dillard, who affixed his signature, as did also witness, at the end thereof; that witness then read over to him the statement immediately following said questions and answers, marked "*declaration*," as a part of said proposals, and that Dillard assented to the same, and signed it, as it appears on its face; that after all this was done, said papers so signed and executed were handed by witness to Dillard, who kept them several hours, and after that were returned by Dillard to witness, to be sent forward to the defendant or her general State agents in this State, to be accepted by her according to the terms appearing on their face; that defendant thereupon accepted said proposals, and issued the policy sued on, and on the condition therein contained, that if the said proposals, answers, and declaration made by Dillard and returned to defendant should be found to be fraudulent or untrue in any respect, or that there was any willful misrepresentation or concealment in said "declaration," then that the policy should be void.

After the introduction of this testimony by defendant, the plaintiffs introduced one John T. Cox as a witness, and offered to prove by him that he was present at the time question 5 was propounded to Dillard by Yeizer, and that Dillard did not answer thereto "Yes," but answered to this effect, "I never refuse to take a drink;" or, "I always take my drinks," and that the answer "Yes" was improperly written down by Yeizer, without the knowledge or consent of Dillard; to the introduction to which testimony of Cox the defendant objected, as incompetent under

the state of facts proved as above, in relation to the execution, signature, and delivery of said proposals.

But the objection was overruled, and the court permitted said testimony to go to the jury; and defendant excepted.

Second Exception.

The defendant introduced as a witness, in support of the issues on its part, Dr. Alexander, who testified that he was a regular practicing physician, in June, 1870, and medical examiner of the Continental Insurance Company of New York, and that in June, 1870, said Dillard submitted himself for examination as an applicant for insurance in said company, and was examined by witness; and defendant then asked witness what was his opinion on said examination, as to Dillard being a fit subject for insurance, and witness stated that he pronounced him not worthy of insurance. And thereupon plaintiffs asked the witness whether he made a report in writing to said Insurance Company of his opinion aforesaid, and witness replied that he did state his opinion in writing to said Company; and thereupon plaintiffs moved to exclude from the jury said opinion, because the same was in writing, which should be produced, or its loss or absence accounted for; which motion was sustained by the court, and said testimony was excluded; and to this the defendant excepted. The defendant further asked witness whether he was acquainted with the state of health at the time of his examination by witness, in June, 1870, and if so, what it was, and the nature of his disease or malady, if any; to which question plaintiffs objected, and the objection was sustained, and said question was not allowed by the court to be answered. To this ruling the defendant excepted.

Third Exception.

On cross-examination of the witness, Yeizer, above named, the said witness was asked by the plaintiffs whether or not one Dearing, general traveling agent and supervisor of defendant in the Southern States, some time after the death of Dillard, visited Edwards' Depot, for the purpose of

examining into the claim of plaintiff for the payment of the policy here sued on; if so, did he make such examination, and did he express an opinion as to whether or not said payment should be made? To the answering of which question the defendant objected; but the objection was overruled by the court; whereupon said witness testified that said Dearing was the general traveling agent and supervisor of defendant for the Southern States, and that Handy and Andrews were general agents for the State of Mississippi; that Dearing did, sometime after Dillard's death, visit Edwards' Depot, where Dillard died, for the purpose, as he stated, of examining into the liability of defendant on the policy sued on; that witness introduced him to a number of the leading citizens of the place, for the purpose of enabling him to ascertain the facts; that he remained some hours, and before leaving expressed to witness that, in his opinion, it would be best for defendant to accept the situation and pay the policy.

To the ruling of the court in permitting said answer to go to the jury the defendant excepted as incompetent.

Fourth Exception.

It was agreed that all the original papers filed in this cause in the circuit court of Hinds county, from which it was removed, and which were competent evidence for either side, and copied in the transcript filed, should be read in evidence. The plaintiffs offered to read in evidence the certificate of A. P. Harris, the medical examiner of defendant, who examined Dillard upon his application for the policy sued on, in the words following. (See Transcript of Record, p. 84.) To reading which defendant objected, for the reason that said Harris should have been introduced and examined in court as a witness. The court overruled the objection, and permitted the certificate to be read in evidence to the jury; to which defendant excepted.

Fifth Exception.

Plaintiffs offered to read in evidence to the jury, from the transcript of the record from Hinds circuit court, the

following statement of John G. Yeizer, who was the same person already examined and cross-examined as a witness, (see statement in full on p. 85 of Transcript,) to reading which defendant objected, because—

1. Because said statement was not referred to in any of the pleadings, nor made part thereof, nor was it properly a part of the record.

2. That as to any matters stated therein, Yeizer should have been examined as a witness, he being in court.

3. Such statement was not offered on the ground of impeaching Yeizer's credit, but as evidence generally.

4. The matters therein stated are irrelevant to the issues made.

But the objection was overruled, and the statement permitted by the court to be read to the jury; to which the defendant excepted.

Sixth Exception.

After the evidence was closed, the court charged the jury (Record) "that if they are satisfied from the proof that the defendant issued the policy read in evidence, and on which this suit is brought, upon the faith of the answer 'Yes' to question 5, as taken by Yeizer, defendant's agent, and the '*declaration*' read in evidence, yet, if the jury believe from the evidence that said Yeizer, agent of defendant in taking said proposal and answers, did not truly and correctly write down the answer of said Dillard to question 5, and that the answer of said Dillard was not 'Yes,' but that his answer really given was, 'I never refuse to take a drink,' or 'I always take my drinks,' then the defendant can claim no benefit of defense in this suit on account of the answer 'Yes,' for the reason that the act of the agent, Yeizer, at the time of taking said answer to said question 5, was the act of the dedefendant, and binding on the defendant, his principal, as much so as if the defendant had been present at the time of taking said answer to question 5; and it makes no difference, as to defendant's liability upon said policy, that the defendant, when said policy was issued, had no knowledge of the transactions, other than that which appeared on the

face of said proposals, answer, and declaration; that insurance companies, like all other parties, are bound by the acts of their agents; that that which is done by the agent is to be considered as done by the company, and notice to the agent, whilst in the transaction of his agency, is notice to the company."

To all of which defendant excepted.

III.

Assignment of Errors.

The errors relied upon by the plaintiff in error are:

1. The ruling which admitted the testimony of the witness, Cox, to contradict by parol the written answer of Dillard to question 5 in the declaration and proposals made by the latter to the insurance company; said answer as written, being a warranty, being affirmed by the subsequent answer of Dillard, also written to question 16, and being also ratified and repeated by Dillard's delivery of the papers to the company after they had been handed to him and had been kept by him several hours. (First bill of exceptions, Record, pp. 79, 82.)

2. The rulings which excluded the testimony of the witness, Dr. Alexander, as to his finding, on examination of Dillard, in June, 1870, that the latter was not a fit subject for insurance, and as to the latter's state of health and the nature of his disease or malady at said period. (Second bill of exceptions, Record, pp. 82, 83.)

3. The ruling which admitted, on plaintiff's cross-examination of Yeizer, the testimony of that witness as to certain opinions expressed by one Dearing, as to the expediency of payment by defendant of the policy now in suit. (Third bill of exceptions, Record, p. 83.)

4. The ruling which permitted plaintiff to read in evidence the certificate of Harris, the medical examiner who examined Dillard upon his application for the policy. (Fourth bill of exceptions, Record, p. 84.)

5. The ruling which permitted plaintiff to read in evidence the statement of Yeizer as to the health and insur-

able character of Dillard. (Fifth bill of exceptions, Record, p. 85.)

6. The instructions of the court to the jury, as follows: "That if they are satisfied from the proof that the defendant issued the policy read in evidence, and on which this suit is brought, upon the faith of the answer 'Yes' to question 5, as taken by Yeizer, defendant's agent, and the declaration read in evidence, yet, if the jury believe from the evidence that said Yeizer, agent for defendant, in taking said proposal and answers, did not truly and correctly write down the answer of said Dillard to question 5, and that the answer of said Dillard was not 'Yes,' but that his answer really given was, 'I never refuse to take a drink,' or 'I always take my drinks;' then the defendant can claim no benefit of defense in this suit on account of the answer 'Yes,' for the reason that the act of the agent, Yeizer, at the time of taking said answer to said question 5, was the act of the defendant, and binding on the defendant, his principal, as much so as if the defendant had been present at the time of taking said answer to question 5; and it makes no difference, as to defendant's liability upon said policy, that the defendant, when said policy was issued, had no knowledge of the transactions, other than that which appeared on the face of said proposals, answer, and declaration; that insurance companies, like all other parties, are bound by the acts of their agents; that that which is done by the agent is to be considered as done by the company; and notice to the agent, whilst in the transaction of his agency, is notice to the company." (Record, pp. 86, 87.)

IV.

Argument for Plaintiff in Error.

I. The first exception to the court's ruling, in admitting the testimony of the witness Cox, was well taken. (Record, pp. 79, 82.)

The facts of the case, as proved by the witness Yeizer, showed clearly a *warranty* by the insured.

1. The transaction consisted of, 1st, his original answer

"Yes" to question 5, as stated in the written proposal; 2d, his answer to question 16, that he had reviewed the answers as written, and *affirming his answers as written*, including that to question 5; 3d, his accompanying "*declaration*," asseverating the truth of that answer as written; 4th, his subsequent delivery and propounding to the company of said answers and *declaration* as the basis of his application; 5th, his acceptance of the policy, with *the stipulation in it* that it was *issued by the company*, and *accepted by him, on the faith that the answers and declaration, as stated*, were true and correct.

A warranty is a "stipulation forming a part of the contract as it has been completed, and is construed as a condition precedent, which must be strictly complied with to the minutest detail, or else the contract is rendered void."

Bliss on Life Insurance, § 34.
Angell on Insurance, § 140.
Campbell *v.* N. E. Life Ins. Co., 98 Mass., 381.
Anderson *v.* Fitzgerald, 4 Ho. Lords Cas., 484.

"When the representations of the insured," says Mr. Justice Clifford, "are expressly referred to in the policy as forming a part of the contract, they will acquire the character of warranties, and invalidate the insurance, unless strictly complied with, whether they are or are not material to the risk assumed by the insurer."

Eddy St. Iron Foundry *v.* Hampden S. and M. Fire Ins. Co., 1 Clifford, 300.
8 Metcalf, 141.
5 Hill, (N. Y.,) 188.
6 Cushing, 42; Ib., 340.
Bliss on Life Ins., § 57.

The testimony of Yeizer, as stated in this bill of exceptions, confirmed, as it is, by the proposals, declaration, and policy, shows every element of *a warranty*.

This warranty, then, is the basis of the obligation of the Company; and, when adopted by the applicant, and by him propounded to and accepted by the company, accord-

ing to its terms appearing by the face of the papers, it conclusively binds him. Whether the answers and declaration were originally correct or not, he adopted and ratified them as stated, and is forever concluded to say that the answers, as stated, are not his.

2. In cases of warranty, the warranty is construed to mean precisely what it says. If clear and explicit in its terms, no evidence *aliunde* is admissible to contradict, control, restrain, vary, or extend it.

Angell on Ins., § 142*a*.
Phillips, § 754.
Bliss, §§ 38, 43.

When the language of a written contract is neither ambiguous nor technical, parol evidence is not admissible to explain it, so as to establish a new term in it.

Partridge *v.* Ins. Co., 15 Wallace, 573.

If this be not true, no contract, however fully and solemnly made, is binding; the most deliberate admissions made as the basis of it may be denied, and a premium is allowed to fraud and imposture.

1 Greenl. Ev., § 208.
Bliss, § 81.

Now, this warranty, consisting mainly of *the acts of the applicant, done after the answer to question* 5 *was written down*, was made *to the company*, and was confessedly the basis of its action in issuing the policy. The agent was the mere *conduit* through whom the proposal to make it was communicated. He could not, and did not, make the contract, but merely received the application, to be forwarded to the company, who, upon consideration of the proposals, as stated, made the contract, expressly upon the faith and basis of *the terms stated in the proposals submitted.*

Vose *v.* Eagle Life and Health Co., 6 Cushing, 42.
Angell on Ins., § 323.
Bliss, § 81; Ib., § 293.

The agent's action, in taking the original answer, was merely preliminary, and ineffectual without the subsequent "declaration" ratifying it, and proposing the answer, as written, as the basis of the contract.

Here there was no controversy that the subsequent delivery of the proposals, with the answer and "declaration," as written, and signed by the applicant, was deliberately delivered by him to the company's agent, to be sent to the company as the proposal for insurance, after having had it in his possession ample time for examination after it was signed by him.

The necessary effect and object of the testimony of Cox, here objected to, were to deny the warranty and to contradict its terms, thus fully adopted and acted upon by the applicant, and proposed as the terms of the contract. This was clearly incompetent.

Admissions *on which others act*, especially if made for that purpose, are conclusive against the party making them. (1 Greenl. Ev., § 207.) And it makes no difference whether the thing admitted was true or false. (Ib., 208.)

This rule is applied, in all its force, to representations on which policies of insurance are issued, per Lord Mansfield, cited in Park on Insurance, 4; and is pointedly stated by this court in the case of Insurance Co. *v.* Wilkinson, 13 Wallace, 222–233, thus: "Where one party has, by his representations or his conduct, induced the other party to the transaction to give him an advantage, which it would be against equity and good conscience for him to assert, he would not, in a court of justice, be permitted to avail himself of the advantage."

The warranty in this case is fully within these rules.

Plumb *v.* Cattaraugus Ins. Co., 18 N. Y., 392.

3. The testimony of Cox stands upon wholly different ground from that in Insurance Co. *v.* Wilkinson, 13 Wallace. The facts of this case clearly distinguish it from that, in every material respect.

1. That was a case of *misrepresentation*. This is one of

warranty. The distinction is essential. A *misrepresentation* is not introduced into the policy, and is not incorporated in the contract. But a *warranty* becomes such by being referred to in the policy as the basis on which it is issued. (Angell on Insurance, p. 196, § 147*a*; Arnoult on Insurance, 499.) And a warranty is absolute according to its terms. (Bliss, § 63.)

2. The false warranty here did not consist alone in the answer given to question 5, as to the applicant's temperate habits, but in the further facts, that after the answer "Yes" had been written, and was deliberately affirmed in the answer to question 16, the paper containing it was delivered back by the company's agent to Dillard, who kept it several hours, and then handed it back to the agent, with his signature subscribed to it, and also to the declaration subjoined to it, to be sent to the company for its action; which "declaration" contained a positive reference to the answers *as written* in the paper, and a distinct reaffirmation of their truth and correctness.

It is no answer to this to say that the answer "Yes" was untruly written by Yeizer, and was not really the answer given by Dillard; and that the company is bound by the wrongful act of its agent. For, though it be conceded to have been incorrectly written down by the agent, yet all the subsequent acts of Dillard, above mentioned, render that immaterial, and bind him to an adoption of the answer, as the warranty on which the policy was issued by the company. None of these acts of subsequent reaffirmance appear in the case in 13 Wallace; and that case and those there cited are not not in point, under the facts of this case.

But it is held that, though the knowledge of the insurer relieves against the effect of a *false representation*, it does not relieve against a false *warranty*. (Per Strong, J., in State Mut. Ins. Co. *v.* Arthur, 30 Pa. State Rep., 315, 331.)

There is no pretence that any fraud was practiced upon Dillard, in relation to the *acts done by him after the original answer was taken down*—his answer to question 16; his "declaration," signed by him; his subsequent keeping of

the proposal after the answer was written, with his signature to it; his delivery of it to the agent to be forwarded; and his acceptance of the policy containing the stipulation affirming the correctness of the answer as written. These acts have all the forms of deliberate acts. In the absence of all fraud in obtaining them—which is not alleged, and is not to be presumed—the law gives them the character of deliberate acts.

Chase *v.* Hamilton Fire Ins. Co., 20 N. Y., 52.
Liberty Hall Association, 7 Gray, 261.
Bliss, § 293.

And it is well settled, that if the applicant knows that the facts are incorrectly stated in an application made out by a company's agent, the company is not liable; for he is a party to the fraud upon it.

Smith *v.* Cash. Mut. Ins. Co., 24 Penn., 320.
Vose *v.* Eagle Life and Health Ins. Co., 6 Cushing, *supra.*
Smith *v.* Empire Ins. Co., 25 Barb., 497.
Wilson *v.* Conway Ins. Co., 4 Rhode Island, 141.
Plumb *v.* Cattaraugus Mut. Ins. Co., 18 N. Y., 392.

Now, these *subsequent acts* constitute the controlling features of this contract, and fix its character as *a warranty* of the truth of the answer 5, as written down; *which is conceded to have been false*, and which, therefore, according to the stipulation of the policy, rendered it void.

All that the testimony of Cox tended to prove was, that the answer to question 5, *as written*, was not Dillard's answer *as given*. Yet, if he afterwards acted upon it, and had it sent forward as the basis of his application, after time and means of examining it, and *accepted the policy on the faith of his "declaration" that it was true*, he is bound to its truth, and it is immaterial what his original answer really was. Under these facts, proved, it was not competent to show that the answer thus repeatedly reaffirmed and adopted, and *proposed as the basis of the policy*, was untruly stated.

Hence the testimony objected to was directed to an immaterial fact, which could have no legitimate influence on the issue of false warranty, and was calculated to prejudice the minds of the jury, and must be presumed to have had that effect.

II. In this connection, the sixth exception may properly be considered. The charge of the court, (Record, pp. 86, 87,) on which it is taken, we submit, is erroneous in several points of view.

1. It wholly ignores the force of the subsequent declaration and warranty, and of the stipulation in the policy that it was issued and accepted on the faith of the truth of the answer as written and signed, and of the conduct of the applicant in proposing it as a true answer to the questions embraced in his proposals. It virtually holds that, if the answer "Yes" was not correctly written by the agent, it does not affect the policy, though false as written, *even though it was afterwards solemnly adopted by the applicant as written*, and with a knowledge of its falsehood, was subsequently proposed by him as the basis on which he sought the policy.

It is above shown, that by these subsequent acts, the original answer was merged in the declaration and warranty, which thenceforth became the true and only basis of the contract; and whether the answer, as written, was the true one given or not, his subsequent declaration that it was true as written, and his proposal of it to the company, as the basis of the policy desired, conclusively bind him to the truth and correctness of it as written.

The instruction was founded on a misconception of Insurance Co. *v.* Wilkinson, 13 Wallace, the facts of which are essentially different from those here presented. In that case, after the answers were given, there was no subsequent affirmation of their truth; no delivery of the paper to the applicant after it was signed, and no means or opportunity of his examining it; no subsequent handing it back by him, without objection, to the agent; no subsequent distinct act of adoption, as here, and especially no stipula-

tion in the policy that it was issued on the faith of the answers, as written, being true, and, if otherwise, that it was void.

The distinctive and decisive facts, it is submitted, resolve this case on totally different principles from those held in the case referred to, and show, upon the authorities above cited, that this instruction was error.

But it is further objectionable on the ground of being *upon the force and weight of evidence*, which is forbidden by the law of Mississippi.

The answer of Dillard, as proposed to be shown by the witness Cox, and referred to in the instruction, is assumed by it to be of essentially different import from the answer "Yes" appearing in the proposals. But the answer "Yes," that is, that he "was regular and temperate in his habits," is not clearly and necessarily inconsistent with the answer alleged to have been the one really given, viz: "I never refuse a drink," or "I always take my drinks." For, if that was the real answer, he might have intended to say that he was still temperate and regular in his habits, *never drinking to excess*. And that is the fair interpretation of his answer, as alleged to have been given, since, otherwise, it would have been a confession that he was irregular and intemperate in his habits; which is not to be supposed to have been intended, since it would necessarily have defeated his application. It was understood by Yeizer to be intended as an affirmative answer to the question; and that it was so intended by Dillard is plain from the fact that he afterwards, upon due consideration, adopted the answer "Yes," and made his application to the company, and accepted the policy on the faith of it, when, if he had made his answer with the intent ascribed to him by this instruction, his purpose must have been defeated. *He has shown his own intention by afterwards adopting the answer "Yes."*

The question of *intention*, under the circumstances, was cut off from the jury by the court's charge, when it should have been left to them to determine whether, if he used the words as alleged, he did not intend to convey the idea

thereby that his habits were regular and temperate. It was a matter peculiarly within the province of the jury to determine what was his intention, from his language and conduct; and yet the court assumed to settle it, and did so, in a manner inconsistent with the marked conduct of Dillard in the transaction.

The law of Mississippi prohibits the court from instructing the jury upon the weight of evidence, thus: "No judge in any cause shall charge the jury as to weight of evidence," (Rev. Code Mississippi, 1871, § 643;) and it is the settled rule of practice in Mississippi, that it is error in charging the jury to assume facts stated in the instruction. (35 Miss., 166, 171; 37 *ib.*, 471, 476; 40 *ib.*, 240, 247.) And this principle is sanctioned by this court in 11 Wallace, 391, 394.

And these rules are adopted as rules of practice in the courts of the United States by act of Congress, June 1, 1872. (Statutes at Large, vol. 17, p. 196, § 5.)

Questions of intention fall especially under this rule; and when they must be determined from the *language and conduct* of a party, as in this instance, they belonged peculiarly to the jury.

This charge was a violation of this rule. It was fatal to the defendant's case, though the answer "Yes" was intended to be the answer given, or *was adopted by the applicants subsequent repeated acts, and proposed by him as the basis of the contract*, when it was in fact false.

In this respect the instruction was clearly erroneous.

III. The second exception (Record, pp. 82, 83) was well taken on two grounds:

1. Dr. Alexander, medical examiner for the Continental Life Insurance Company, testified for defendant that, in June, 1870, Dillard submitted himself to the witness for examination as an applicant for insurance in that company, and was examined by him, and pronounced thereon unworthy of insurance. The plaintiff then asked witness whether he made a report in writing of his opinion to that

company, to which he answered that he did; whereupon plaintiffs moved to exclude from the jury the witness's opinion as testified to, because it was in writing; which motion was sustained.

The sixth plea put in issue the fact that Dillard had made application to other insurance companies, and had been rejected. And the testimony offered by defendant was direct to the material point, that he had made such application to the Continental Company, through its medical examiner and agent, and had been rejected, because he was pronounced by him unworthy of insurance.

These facts were substantive and material facts, distinct from any report or written statement made by the physician to the company for which he was acting. Whether he made such report, or gave such opinion in writing or not, was immaterial; for the issue was, *did Dillard make the application, and was it rejected by the medical examiner of the company because he considered him unfit?*

If such were the facts, the suppression of them in Dillard's answers was a violation of his warranty, and rendered the policy void, under the positive terms of the "declaration" and of the stipulation in the policy.

At the plaintiffs' instance, the witness stated that the application was in writing, and was forwarded by him to the company; so that *the application was complete*, and, if accepted, it was for the plaintiffs to prove it. But the defendant asked no question about the writing, and its contents were irrelevant to the issue; nor could it, if produced, have tended, in any degree, to elucidate the questions, whether *Dillard made the application*, and *whether it had been rejected—which were the issues.*

2. The defendant further asked this witness, whether he was acquainted with the state of Dillard's health at the time of that examination; and if so, what was the nature of his malady, if any. To this question plaintiffs objected, and the objection was sustained.

The testimony offered was clearly proper. If his health was feeble, or if he was laboring under any serious malady

at the time, as, for instance, one produced by excessive use of intoxicating drinks, it would have rendered him unable to withstand the habit of "always taking his drinks," &c., as alleged by Cox to have been his answer to question 5; and it might have greatly impaired his health, and rendered him unfit for insurance. If such was his condition, his alleged answer to question 5 suppressed it, and rendered his answer false. And this deprived the defendant of all benefit of probing his answer, as testified to by Cox.

But this evidence was clearly proper, for the purpose of rebutting the opinions and statements of the witnesses, Harris and Yeizer, in behalf of the plaintiffs, as to the health of Dillard, as shown in bill of exceptions No. 4.

IV. Yeizer, the defendant's agent, who took the application, was asked by plaintiffs as to *certain opinions expressed by one Dearing*, as to the liability of defendants on the policy sued on; which was objected to by defendant, but the objection was overruled. The witness then testified that Dearing was "the *general traveling agent* and *supervisor of defendant*" for the Southern States, and that Handy & Andrews were the general agents for the State of Mississippi; that Dearing, some time after Dillard's death, visited Edwards' Depot, where Dillard died, for the purpose of examining into defendant's liability on this policy; that witness introduced him to a number of persons, and he remained there some hours, and, before leaving, expressed the opinion that it would be best for the defendant to accept the situation and pay the policy. (Record, p. 83.)

This testimony was manifestly inadmissible.

1. Before the declaration of Dearing was admissible, it was necessary to show that he was authorized by the company to act in the matter, and that his action and declarations were within the scope of his agency. (Dunlap's Paley on Agency, 268, 273, 274, note 1; 4 Rawle, 294.)

But here there is a total absence of such proof. All that appears is that he was "*the general traveling agent and supervisor of defendant in the Southern States.*" But these

terms import no authority whatever to bind the company by any act or admission of his, and there is no other proof of his possessing such power. It cannot be inferred from the terms used. (Story on Agency, §§ 77, 78, 98, 99.) And no presumption can be indulged as to its existence.

It is shown that Handy & Andrews were the "*general agents*" for Mississippi. The *general* authority to bind the company in that State must be presumed to have been committed to them, if to any persons there. And it appears they did not recognize or act upon Dearing's opinion; for this suit was brought under their agency. The company did not recognize it, but denied their liability, and submitted to this suit in opposition to it.

The authority of the principal to the agent to do the particular thing, or to bind him in the particular business, must be shown before his acts or admissions will bind them. His agency extended here simply to the power *to travel* for the company, and to "*supervise*" its business; to inquire into and *overlook* its condition; advise with the general State agents, and report to the company; and thus to protect the company's interests. His agency, as shown, was solely *for information and advice*. But there is nothing from which it can even be inferred that he had power to bind them in any of their rights, or to fix their rights or liability on any past transaction by act or admission of his, as by giving a note for the money claimed, or agreeing that the company would pay the amount, or the like. (Story on Agency, § 77.) And yet, by this ruling, Dearing is *assumed* to have had authority to bind the company and to charge them with a liability.

2. Generally, declarations of agents, in order to be evidence against principals, must be shown to have been made while the transaction is going on on which the principal's liability arises. (Dunlap's Paley on Agency, 271, note 1; Langhorne *v.* Allnutt, 4 Taunt., 511.) Here the effort was to show the liability of the principal *as to a past transaction*, in which its *status* was already fixed, by showing an *ex post*

facto admission of a person not shown to have been authorized to do any act therein affecting the liability.

3. The declaration was a mere *expression of opinion* by Dearing upon facts fully transpired, and over which he had no control—upon reasons not stated and not appearing, which, if set forth, might be wholly insufficient to sustain his opinion. And this opinion, which, under the ruling of the court, had the effect of an admission of the liability *by the company*, operated fatally on the trial, as conclusive of its liability on the policy.

V. The substance of the agreement stated in the fourth exception (Record, p. 84) was, that the copies of such papers contained in the transcript from Hinds, filed in the cause, as *were competent evidence for either party*, should be read in evidence on this trial; that is, without producing the originals.

But the certificate of Harris was not competent evidence. The original would not have been competent evidence, and therefore the copy was not admissible under the agreement, because—

1. It was but the *unsworn statements* of Harris, without the benefit of cross-examination, and the opportunity to the defendant to test the truth of his statements.

2. It was but secondary and hearsay, and the witness should have been produced.

VI. The statement of Yeizer, contained in the transcript from Hinds county, as to the health and insurable character of Dillard, was improperly admitted over the defendant's objection.

1. Said paper was not made a part of the record, by being referred to in the pleas; and the copy offered was but secondary evidence.

2. It was *hearsay*, without the sanction of an oath, and it deprived the defendant of the benefit of cross-examination.

3. Yeizer was examined as a witness in the cause, and he should have been examined, if desired, by the plaintiffs

in relation to the matters of the paper here offered in evidence.

4. It was not offered for the purpose of contradicting the testimony of Yeizer, given at the instance of the defendant; and it would have been incompetent for that purpose, since his attention was not called to its statements when he was examined by plaintiffs.

The Queen's Case, 2 Brod. & Bing., 313.
Conrad *v.* Griffin, 16 How., 38.

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